83-1076

No. ——



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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NATIONAL ENQUIRER, INC.,
*Appellant,*

v.

CAROL BURNETT,
*Appellee.*

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**On Appeal from the Califorinia Court of Appeal, Second Appellate District**

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## STATEMENT AS TO JURISDICTION

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JOHN G. KESTER *
HAROLD UNGAR
Hill Building
Washington, D.C. 20006
(202) 331-3069
*Attorneys for Appellant*

*Of Counsel:*
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## QUESTIONS PRESENTED

1. Do the First and Fourteenth Amendments permit a state, arbitrarily and based solely on content, to impose on one publisher of a weekly tabloid a harsher standard for libel liability and damages than that applied to other weekly and monthly publications?

2. Do the First, Fifth, Eighth and Fourteenth Amendments permit a public figure to obtain punitive damages in a civil proceeding for libel based simply on showing of "conscious disregard for the rights of others" by a preponderance of the evidence, when:

—There was no proof, and no claim, that the publisher acted out of hatred or ill will;

—There was admittedly no measurable damage to reputation;

—The article complained of was promptly retracted; and

—Punishment was held justified because of the court's stated distaste for the defendant's "style of journalism"?

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Pursuant to Rule 28.1, Appellant states that it is a Florida corporation wholly owned by GP Group, Inc., a Delaware corporation that also owns Distribution Services, Inc., a Delaware corporation, and Weekly World News, Inc., a Florida corporation. Appellant has no other affiliates or subsidiaries except wholly owned subsidiaries.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

## TABLE OF AUTHORITIES

*Cases:* Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued



*Statutes:*

TABLE OF AUTHORITIES—Continued

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## STATEMENT AS TO JURISDICTION

Appellant appeals from the judgment of the California Court of Appeal, Second Appellate District, entered in this case on July 18, 1983, as modified August 1, 1983, holding that California Civil Code §§ 48a and 3294, as applied to Appellant in this case, do not violate the First, Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

## OPINIONS BELOW

The opinion of the Court of Appeal is reported officially at 144 Cal. App. 3d 991 and unofficially at 193 Cal. Rptr. 206. It is reproduced in Appendix A, *infra*. The order of the Supreme Court of California denying hearing without opinion is unreported; it is reproduced in Appendix B, *infra*. The opinions of the Superior Court of the State of California for the County of Los Angeles are unreported; they are reproduced in Appendices C and D, *infra*.

## JURISDICTION

The judgment of the California Court of Appeal was entered July 18, 1983 and modified August 1, 1983. A timely petition for rehearing was denied by that court on

August 11, 1983. The Supreme Court of California denied a timely petition for hearing on October 6, 1983. Notice of appeal to this Court was filed in the Court of Appeal on November 28, 1983. See Appendix E, *infra*. This Court has jurisdiction under 28 U.S.C. § 1257(2).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

California Civil Code § 48a provides in relevant part:

> "Libel in newspaper; slander by radio broadcast
>
> "1. Special damages; notice and demand for correction. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. . . .
>
> "2. . . . no exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication or broadcast with actual malice and then only in the discretion of the court or jury, and actual malice shall not be inferred or presumed from the publication or broadcast. . . .
>
> "4. . . . (d) 'Actual malice' is that state of mind arising from hatred or ill will toward the plaintiff. . . ."

California Civil Code § 3294 and other pertinent constitutional and statutory provisions are reproduced in full at Appendix F, p. 67a, *infra*.

## RAISING THE FEDERAL QUESTION

As it had in the trial court, Appellant argued in the Court of Appeal that if construed to exclude Appellant from its protection, California Civil Code § 48a "would be an arbitrary and irrational distinction, based apparently on media content, which would violate the First and Fourteenth Amendments of the United States Constitution," and "lead to the unconstitutionality of the provision in question." Appellant also contended that applica-

tion of California's general punitive-damage statute, California Civil Code § 3294, to Appellant in this case would violate the First, Eighth and Fourteenth Amendments to the United States Constitution. The Court of Appeal rejected those arguments and held both that § 48a could be applied to exclude Appellant and that Civil Code § 3294's provision for punitive damages based simply on "conscious disregard" of the rights of others was constitutional as applied to Appellant. Pp. 14a, 20a-21a, *infra*. Appellant renewed the same arguments to the Supreme Court of California, which denied review. Because the constitutionality of the statutes as applied was drawn into question, and the decision below upheld their validity, this Court has jurisdiction on appeal under 28 U.S.C. § 1257(2). See, *e.g.*, *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 440-41 (1979). *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 289 (1921).[1]

## STATEMENT

This is an action for libel brought by the actress Carol Burnett against the National Enquirer, Inc., publisher of the weekly tabloid *National Enquirer*. The alleged libel consisted of a four-sentence news item in the *Enquirer*'s March 2, 1976 gossip column, headlined "Carol Burnett and Henry K. in Row," and reading in its entirety:

> "At a Washington restaurant, a boisterous Carol Burnett had a loud argument with another diner, Henry Kissinger. Then she traipsed around the place offering everyone a bite of her dessert. But Carol really raised eyebrows when she accidentally knocked a glass of wine over one diner—and started giggling instead of apologizing. The guy wasn't amused and 'accidentally' spilled a glass of water over Carol's dress."

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[1] If for any reason this Court were to conclude that appellate jurisdiction under 28 U.S.C. § 1257(2) were lacking, we respectfully request that this jurisdictional statement be treated pursuant to 28 U.S.C. § 2103 as a petition for certiorari under 28 U.S.C. § 1257(3). Title 28 U.S.C. § 2403(b) may be applicable.

Ms. Burnett's attorney demanded a retraction of that news item "in the manner provided for in Section 48(a) [*sic*] of the Civil Code of the State of California." Appellant agreed to retract in accordance with that statute, and accordingly on April 6, 1976, it published the following retraction and apology, in bold-face type, again in the gossip column:

> "An item in this column on March 2 erroneously reported that Carol Burnett had an argument with Henry Kissinger at a Washington restaurant and became boisterous, disturbing other guests. We understand these events did not occur and we are sorry for any embarrassment our report may have caused Miss Burnett."

Notwithstanding the retraction, Ms. Burnett sued for libel, demanding $5,000,000 compensatory damages, and in addition $5,000,000 punitive damages. The complaint alleged that Appellant published "a weekly newsaper of national circulation" and that Appellee had demanded, but not adquately received, a retraction "pursuant to California Civil Code § 48(a) [*sic*]."

California Civil Code § 48a sets two separate limitations on damages that can be imposed for a libel published "in a newspaper" or by radio:[2] First, if an adequate retraction is timely made, a plaintiff can recover only special damages (*e.g.*, for out-of-pocket losses), but no general damages (*e.g.*, for hurt feelings), and no punitive damages. Second, in every case—even if no retraction is made—the statute prohibits punitive (exemplary) damages except on proof that the publisher acted with "that state of mind arising from hatred or ill will toward the plaintiff."

For four years after filing the complaint, Appellee's attorney continued repeatedly to allege that this case was controlled by § 48a. The trial court indeed initially held that the "hatred or ill will" required under § 48a could

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[2] Television broadcasts are covered by § 48a by virtue of California Civil Code § 48.5.

not be shown, so that therefore § 48a precluded punitive damages in this case. But thereupon Appellee's attorney moved to overturn his own repeated prior allegations that § 48a applied. He changed his position because, he frankly explained,

> "it occurred to your declarant that if the National Enquirer were not a newspaper, . . . the definition of actual malice [requiring proof of hatred or ill will] as contained in § 48(a) of the Civil Code would not apply."

The trial court at first rejected that new argument, again holding:

> "the National Enquirer, Inc. is a newspaper within the meaning of newspaper as said term is contained in Civil Code § 48a."

However, six months later on Appellee's renewed motion the trial court revised its position and held that whether § 48a applied was "a triable issue of fact."

At trial the court excluded the jury and announced, "we are here to decide whether or not the publication is a newspaper or magazine." It then heard testimony on this point from two journalism professors, the *Enquirer*'s head of story control, and the *Enquirer*'s editor.[3] The

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[3] One professor was the Chairman of the Journalism Department at the State University of California at Long Beach, and also the President of the Los Angeles chapter of Sigma Delta Chi journalism fraternity. He testified that based on his five years' experience as a practicing reporter and twenty-two years as a journalism professor, and his "talking with professionals in the newspaper business," the *Enquirer* is what is customarily called a "tabloid newspaper." The other witness, a retired journalism professor presented by Appellee, testified that he had never read the *Enquirer* before being retained by Appellee, but that based on his research of dictionary definitions, his layman's reading of court decisions, and his reviewing the apparent timeliness of only *one* article, he thought the *Enquirer* should not be treated as a newspaper. He added that:

> "I think that deadline thing is not as crucial as the actual content of the publication. . . . The determining factor, to me, was what is referred to as 'news while it's news,' the hot

head of story control testified without contradiction that the *Enquirer* has an average of twenty-five to thirty "hot potato" news items each week, and that late-breaking news items sometimes are prepared the same morning the paper goes to press. The editor supplied examples of rush stories, and listed numerous governmental authorities and trade groups that classify the *Enquirer* as a newspaper.[4]

The trial court at the conclusion of the hearing announced that

> "there probably isn't anything spelled out in terms of standards how to weigh these things. There isn't anything spelled out in the statute. Unfortunately, the cases don't spell it out." Pp. 44a-45a, *infra*.

The trial court then said that it had concluded that the test under § 48a was whether "timely news predominates." "That to me," said the court, "is the critical thing in de-

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news concept that the Supreme Court expressed when it extended the New York Times protection to public figures. The Supreme Court sought to protect hot news."

[4] The *Enquirer* on its front page for years has claimed the "Largest Circulation of Any *Paper* in America." (Emphasis supplied). The editor testified without contradiction that the *Enquirer* has been granted membership in the American Newspaper Publishers Association; it subscribes to the Reuters News Service; its staff call themselves "newspaper reporters;" it describes its business as "newspaper" in its filing with the Los Angeles County Assessor and in its insurance applications; the Nebraska revenue department has ruled that "the National Enquirer meets the qualifications of a newspaper and is thus exempt from sales and use tax;" and the United States Department of Labor describes the *Enquirer* as "belonging to establishments primarly engaged in publishing or printing and publishing newspapers." It was also uncontradicted that the *Enquirer* is printed on newsprint in tabloid format, is not stapled, and is of a size, format and layout indistinguishable from such tabloid dailies as the New York *Daily News* and Chicago *Sun-Times*, while altogether different in format from such magazines as, *e.g.*, *Time* or *Newsweek*. A grouping of the *Enquirer* in 1960 with national magazines was based solely on advertising marketing; moreover, there was uncontradicted evidence that the *Enquirer* had drastically changed its content and become far more active in newsgathering since 1960.

ciding whether this is a newspaper or a magazine." P. 45a, *infra*. After examining four issues of the *Enquirer* (that did *not* include the issue in question), the court held that although "I'm not saying the paper [*sic*] is totally devoid of it," *ibid.*, nevertheless in the court's view "timely news" did not "predominate," *ibid.*, so that "at least for what it is worth I am ruling that the Enquirer is a magazine for purposes of not giving them the benefit of Civil Code Section 48(a) [*sic*]." P. 51a, *infra*.

At trial before a jury the editor of the *Enquirer* testified that the retraction had been published simply to comply with Appellee's demand under § 48a and based on her assurance that the news item had not been correct.[5] Her counsel specifically conceded on the record that there had been no measurable damage to her reputation and that "the only economic loss that she sustained was $250 to her attorneys in endeavoring to get a retraction." Her counsel added that

> "the only damages we are talking about in this case, the only relevant damages, are general damages for emotional distress."

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[5] The evidence at trial showed that Appellant's writers and editors had had at least one reliable source for every element of the four-line news item (except the characterization of a loud discussion with Mr. Kissinger as a "row"), that some parts had two sources, and that none had been contradicted by anyone prior to publication. Appellee, concededly a public figure, admitted that she had in fact been in the restaurant, by her own recollection had drunk "two, possibly three" glasses of wine, had then shared her dessert with other diners who were strangers, and had had an animated conversation with Henry Kissinger, which some characterized as loud. She testified that although she objected to the word "boisterous" in the news item, "effervesent" would have been an accurate description of her behavior that evening and would have satisfied her. She also testified that she had portrayed drunks "numerous times" in order "to make people laugh" because "It's comedy."

The court instructed the jury, because it held Civil Code § 48a was inapplicable, that if liability were found,[6] general compensatory damages could be awarded in whatever amount the jury thought "just and reasonable." The court also instructed that in addition a punitive award could be imposed "in your discretion." It rejected Appellant's contention that punitive damages required showing of hatred or ill will and therefore could not be awarded in the face of Appellee's counsel's concession that

> "I'm not . . . saying that these people [Appellant] . . . have any actually [*sic*] ill will."

Because of its holding that Civil Code § 48a's protections for a "newspaper" did not apply, the court instructed that once liability was established, for a punitive award all that had to be shown—and by merely a preponderance of the evidence—was that Appellant had acted with "conscious disregard for the rights of others." The court added that "the law provides no fixed standards as to the amount of such punitive damages."

The jury set compensatory damages at $300,000, and in addition imposed punitive damages of $1,300,000 (one-half of Appellant's net worth). The trial court—holding that "the record is clear that she suffered no actual pecuniary loss as a result of the libelous article," p. 58a, *infra*—reduced the compensatory damage award to $50,000. With regard to punitive damages, the court said that Appellant habitually engaged in a "style of journalism" that the court characterized as "legalized pandering designed to appeal to the readers' morbid sense of curiosity," p. 60a, *infra*, and on that basis the court approved punishment of $750,000.

On appeal, the California Court of Appeal approved all the reasoning and instructions of the trial court. The Court of Appeal conceded that "no definitive exposition of the scope of § 48a has been articulated sufficiently for

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[6] The liability standard was clear and convincing proof of knowing or reckless disregard for truth or falsity. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

us to say the question of its application here is without doubt." P. 13a, *infra*. It acknowledged that heretofore California had applied the protection of § 48a to the *Saturday Evening Post*, to the *Reader's Digest*, to editorials, and to "columnists, critics, editors." P. 9a, *infra*. The Court of Appeal did not comment at all on one of its own prior decisions, called to its attention by Appellant, in which it had itself held without hesitation that § 48a applies to the *National Enquirer*.[7] Nevertheless, in spite of those other applications, the court said, § 48a applied "as the trial court supposed" only to periodicals whose stories upon review by a court showed "constraints of time," and that "the trial court consistently with the foregoing rationale correctly determined the National Enquirer should not be deemed a newspaper for the purposes of the instant litigation." P. 14a, *infra*.

The court never addressed Appellant's argument that if applied to exclude Appellant, California Civil Code § 48a would violate the guarantees of equal treatment contained in the First and Fourteenth Amendments. And rejecting Appellant's challenge to imposition of punishment for its "style of journalism" based simply on finding "conscious disregard for the rights of others" by a preponderance of the evidence, the court held that this was the standard for punishment set by California Civil Code § 3294, the ordinary punitive-damage statute, and that that statute as applied to Appellant was constitutional. The court commented:

> "While a review of the decisions of that court [the Supreme Court of the United States] on the subject reveals a wide spectrum of opinion concerning the propriety of punitive damages in instances like the

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[7] *Faan* v. *National Enquirer, Inc.*, 78 Cal. App. 3d 543, 144 Cal. Rptr. 496 (1978), reprinted at p. 73a, *infra*. A petition for review of the *Faan* case was denied by the California Supreme Court, but that court held that the court of appeal's opinion in that case did not qualify to be published in the permanent volume of reports. Such publication is reserved for only an opinion that "establishes a new rule of law," criticizes an existing rule, or "involves a legal issue of continuing public interest." California Rule of Court 976.

one before us, we do not find in any of these authorities an announcement of definitive principles which a state must apply to awards of such damages when, as here, the *New York Times* test has been satisfied." P. 27a n.12, *infra*.

The court said it presumed from the excessiveness of the award that the jury had been motivated by "passion or prejudice" against Appellant, p. 24a, *infra*, but nevertheless affirmed the judgments of liability and $50,000 compensatory damages. It offered Appellee a choice between reduction of the penalty amount to $150,000, or a partial new trial limited to punitive damages. Appellee elected the latter. The Supreme Court of California denied review.

## THE QUESTIONS ARE SUBSTANTIAL

By holding that the retraction statute's protection is to depend on a court's impression of a tabloid's content, and also by holding that a public figure can recover punitive damages when the publisher had no ill will (the absence of which Appellee conceded), the decision below conflicts with holdings of at least five state courts and two federal courts of appeals, and violates the First and Fourteenth Amendments. Retraction statutes similar to California's exist in more than thirty states. A number of them, like California's, describe their coverage of the written press by simply referring to "newspapers." [8] Until now, no state had attempted to define "newspaper" in terms of news content,[9] and decisions in parallel contexts have held that to make a periodical's legal status turn on judicial impressions of its content would violate the First and Fourteenth Amendments. *E.g.*, *Hadwen, Inc.* v. *Department of Taxes*, 139 Vt. 37, 422 A.2d 255 (1980),

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[8] *E.g.*, IDAHO CODE § 6-712; IND. CODE § 34-4-15-1; IOWA CODE § 659.2; KY. REV. STAT. § 411.051; MINN. STAT. § 548.06; MISS. CODE § 95-1-5; NEV. REV. STAT. § 41.336; N. DAK. CENT. CODE § 14-02-08; S. DAK. COD. LAWS § 20-11-7; UTAH CODE § 45-2-1.

[9] Minnesota, for example, has interpreted "newspaper" in its retraction statute (on which California's was modeled) to include a mimeographed circular that appeared no more than eight times per year. *Soderberg* v. *Halver*, 276 Minn. 315, 150 N.W.2d 27 (1967).

*appeal dismissed*, 451 U.S. 977 (1981). In addition, the court's order that there be a new civil trial for no purpose except to set punishment for the *Enquirer* violates the same constitutional guarantees, because it was conceded that Appellant did not publish with any ill will, and that Appellee, a public figure, suffered no measurable harm to reputation at all.

## I. BY CAPRICIOUSLY PROTECTING SOME WEEKLY PERIODICALS BUT NOT OTHERS, DEPENDING ON THEIR CONTENT, THE DECISION CONFLICTS WITH DECISIONS OF TWO STATE SUPREME COURTS, OF TWO FEDERAL COURTS OF APPEALS, AND OF THIS COURT.

### A. The Statute Is Applied Arbitrarily and Without Standards.

The trial court held a hearing "to decide whether or not the publication is a newspaper or magazine." The court candidly conceded that

> "there probably isn't anything spelled out in terms of standards how to weigh these things. There isn't anything spelled out in the statute. Unfortunately, the cases don't spell it out." Pp. 44a-45a, *infra*.

That was understatement. "Arbitrary and capricious" is an epithet so often invoked in legal pleadings that by overuse it has almost lost its meaning. But "arbitrary and capricious" is the only phrase to describe California's shifting, inconsistent and standardless applications of its Civil Code § 48a.

The trial court concluded, and the Court of Appeal agreed, that the *National Enquirer* is outside the substantial protections that § 48a provides "in any action for damages for the publication of a libel in a newspaper." Yet that holding is impossible to square with previous applications of § 48a, which have held that "newspaper" in § 48a includes the *Saturday Evening Post* [10] and even the monthly *Reader's Digest*,[11] and that

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[10] *Harris* v. *Curtis Pub. Co.*, 49 Cal. App. 2d 340, 121 P.2d 761 (1942).

[11] *Briscoe* v. *Reader's Digest Ass'n*, 4 Cal. 3d 529, 483 P.2d 34 (1971).

it applies to "columnists, authors, critics" [12] as well as editorials,[13] and to magazines and perhaps even books.[14] California unhesitatingly applies § 48a's protection to other weekly newspapers, at least those published in the State of California.[15] In California the application of § 48a goes back and forth from case to case, without any objective reference point. The California holdings array themselves in the following incomprehensible jumble:

| Newspaper | Not a Newspaper |
|---|---|
| *Saturday Evening Post* | *National Enquirer* (in this case) |
| *Reader's Digest* | *TV Guide* [16] |
| *Friday Observer* (weekly) | |
| *B'nai B'rith Messenger* (weekly) | |
| Magazines and possibly textbooks | |

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[12] *Pridonoff* v. *Balokovich*, 36 Cal. 2d 788, 791, 228 P.2d 6, 8 (1951).

[13] *Kapellas* v. *Kofman*, 1 Cal. 3d 20, 459 P.2d 912 (1969); *Maidman* v. *Jewish Publications, Inc.*, 54 Cal. 2d 643, 355 P.2d 265 (1960).

[14] *Johnson* v. *Harcourt, Brace, Jovanovich, Inc.*, 43 Cal. App. 3d 880, 118 Cal. Rptr. 370 (1974) (dictum).

[15] *E.g.*, *Maidman* v. *Jewish Publications, Inc.*, *supra* (weekly *B'nai B'rith Messenger*). Thus last year in *Gomes* v. *Fried*, 136 Cal. App. 3d 924, 186 Cal. Rptr. 605 (1982), it was held that the protection of § 48a extended to a publication called the *Friday Observer*, which was published once per week in San Leandro, California. Appellee's own expert testified regarding the *Enquirer* that

> "Well, being a weekly *newspaper* [*sic*—his word], it wouldn't be like a newspaper that tries to get 'today' in the first paragraph of every story."

When asked about local California small-town weeklies, he explained:

> "Well, 48(a) protects California newspapers. They are not national exposure. They are not national newspapers."

There are over 400 weekly newspapers published in California.

[16] *Montandon* v. *Triangle Publications, Inc.*, 45 Cal. App. 3d 398, 120 Cal. Rptr. 186, *cert. denied*, 423 U.S. 893 (1975) (*TV Guide*, the court noted, describes itself as a "magazine;" see p. 49a, *infra*).

California has not even applied § 48a consistently to the *National Enquirer* itself. Five years ago in *Faan* v. *National Enquirer, Inc.*, 78 Cal. App. 3d 543, 144 Cal. Reptr. 496 (1978), p. 73a, *infra*, the same California court of appeal held that § 48a applied and indeed was "the statute which is determinative," p. 77a, *infra*, in dismissing a suit against the *National Enquirer*.[17] Then came the present case, which held that the *Enquirer* should not be treated as a "newspaper" after all. And then, less than a month ago, the same California court of appeal in yet another opinion, not involving § 48a, acknowledged that "The Enquirer publishes *a weekly newspaper known as the 'National Enquirer.'*" *Eastwood* v. *Superior Court*, —— Cal. App. 3d —— (Ct. App., 2d Dist., No. 67746, Dec. 1, 1983) (emphasis supplied).[18]

The point is, California as shown by its totally inconsistent pattern of inclusion in and exclusion from § 48a has been following not law, but whimsy. If the California statute were a regulation being applied so capriciously by administrators, there is no doubt that it would violate constitutional requirements of certainty and equal protection. See, *e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886);[19] see also *Kunz* v. *New York*, 340 U.S. 290, 293-

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[17] See note 7, *supra*.

[18] In other contexts, the Supreme Court of California has also held that even an information sheet prepared and circulated by inmates of a state prison is a "newspaper." *Bailey* v. *Loggins*, 32 Cal. 3d 907, 654 P.2d 758 (1982). So also, California has held, is a political tract distributed weekly. *Long* v. *City of Anaheim*, 255 Cal. App. 2d 191, 63 Cal. Rptr. 56 (1967). So is a give-away paper subsisting on advertisements. *Laguna Pub. Co.* v. *Golden Rain Foundation*, 131 Cal. App. 3d 816, 182 Cal. Rptr. 813 (1982), *appeal dismissed*, 103 S. Ct. 1170 (1983).

[19] "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74 (1886).

94 (1951); *Saia* v. *New York*, 334 U.S. 558, 560 (1948). That it is instead being capriciously applied by California courts does not alter its unconstitutionality as applied, under the First Amendment as well as the Fourteenth. *Police Dept.* v. *Mosley*, 408 U.S. 92, 98 (1972); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 604 (1967); *cf.* also *Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964); *Smith* v. *Cahoon*, 283 U.S. 553 (1931).

**B. The Statute Unconstitutionally Distinguishes Among Publications Based Upon Their Content.**

To the extent that they articulated any rationale at all, both courts below made the applicability of § 48a turn, not on the physical qualities of the tabloid, or any other objective test, but rather upon the courts' subjective impressions of the newsworthiness of its content. As the trial court explained,

> "I mean, I don't have any problem distinguishing the New York Daily News from the National Enquirer.
>
> "Sure, they are both in tabloid forms, but that goes to form and not substance.
>
> "And that's what counts." P. 47a, *infra*.

The trial court held that the *Enquirer* did not qualify as a "newspaper" because based upon *the court's* reading of four issues (*not even including* the one in which the news item complained of appeared), "the timely news" did not appear to "predominate," and "[t]hat to me is the critical thing in deciding whether this is a newspaper or a magazine." P. 45a, *infra*.[20] The Court of Appeal, endorsing the trial court's impression of the timeliness of the *Enquirer*'s content, agreed that § 48a applied only where it appeared from the way the stories were written

[20] If the apparent timeliness of content were a legitimate test, then a publication's legal status could vary from issue to issue. And then there would be a simple due process violation here, because the trial court never read the issue in which the news item appeared, but instead examined *four other* issues of the *Enquirer*.

that "the constraints of time as a function of the requirements associated with production dictate the result," and that "the trial court consistently with the foregoing correctly determined the National Enquirer should not be deemed a newspaper." P. 14a, *infra*.

In upholding a statute construed to define "newspaper" based on content and on what to a judge appears to be "timely news," the decision below is in flat conflict not only with this Court's holdings, but with a decision of the Supreme Court of Vermont that recently held just the opposite. In *Hadwen, Inc.* v. *Department of Taxes*, 139 Vt. 37, 422 A.2d 255 (1980), *appeal dismissed*, 451 U.S. 977 (1981), the Vermont court was asked to rule on whether a giveaway advertising weekly qualified as a "newspaper" for purposes of Vermont's use tax exemption. Referring to the First Amendment and to the need to "avoid a construction which may lead to the unconstitutionality of the provision in question," the Vermont Supreme Court explained:

> "Therefore, *we decline to adopt a definition of 'newspaper' publications based upon their content . . . .*" 139 Vt. at 39, 422 A.2d at 257 (emphasis supplied).

In so holding, the court relied on this Court's decisions in *Police Dept.* v. *Mosley*, 408 U.S. 92, 95 (1972), and *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 215 (1975).

The same issue arose last year in Massachusetts, again in the context of applying the exemption for a "newspaper" in a tax statute to a weekly tabloid consisting 85% of advertisements. The highest court of Massachusetts noted that

> "The Town Crier contains a large amount of advertising, but whether it is a newspaper cannot depend on the ratio of advertising to other matters." *Greenfield Town Crier, Inc.* v. *Commissioner*, 385 Mass. 692, 696, 433 N.E.2d 898, 901 (1982).

The Massachusetts court referred to the First Amendment and said that on that point it adopted the reasoning of the Vermont court in *Hadwen, supra. Ibid.*[21]

California's content-based approach to meting out protection, based on a court's perception of "timely news," also is in conflict with decisions of at least two United States Courts of Appeals. In *New Jersey State Lottery Comm'n* v. *United States*, 491 F.2d 219 (3d Cir. 1974), *vacated on other grounds*, 420 U.S. 371 (1975), the Third Circuit sitting *en banc* held that

> "The first amendment makes clear that it is beyond the competency of any governmental agency to determine, a priori, that any item of information is, for any news medium, not news." 491 F.2d at 223.

The same court reiterated that rule just last year in *Ad World, Inc.* v. *Township of Doylestown*, 672 F.2d 1136 (3d Cir.), *cert. denied*, 456 U.S. 975 (1982), holding that a sixteen-page weekly tabloid consisting mainly of advertising was a "newspaper" and as such was constitutionally entitled to be exempt from a local ordinance restricting distribution of advertising materials. And just last month the Second Circuit, in construing the "fair use" provisions of the Copyright Act to accord with constitutional "values of free expression," explicitly rejected the approach taken by the California courts here:

> "The trial court characterized its task as deciding 'whether the Nation's article was "news reporting" . . . .'
>
> "[A] careful reading of the opinion reveals that the district judge decided the piece was not news reporting because it contained insufficient 'hot news' to be

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[21] Similarly, in *Sears, Roebuck & Co.* v. *State Tax Comm'n*, 370 Mass. 127, 345 N.E.2d 893 (1976), the Supreme Judicial Court of Massachusetts held that a tax exemption for "newspapers" should be construed to include even advertising inserts prepared by Sears, Roebuck & Co., in part because of the "effect on First Amendment freedoms." 370 Mass. at 131, 345 N.E.2d at 896. Although both *Hadwen* and *Greenfield Town Crier* were cited to the court below, its opinion made no reference to them.

so classified. The court, in short, substituted its own views concerning the quality of the journalism in *The Nation* article, and then determined that it was not news because it was not good or genuine news. . . .

"We fully agree with our brother Meskill that courts should be 'chary' of deciding what is and what is not news." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, Nos. 83-7277, 83-7327, U.S. Court of Appeals, 2d Cir. (Nov. 17, 1983), slip op. at 193-194.[22]

The Vermont, Massachusetts and Second and Third Circuit interpretation of the Constitution is correct, and the California view is wrong. As this Court has held, "above all else, the First Amendment means that government

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[22] The California courts' *a priori* definition of "newspaper" based on what a court considers timely news has never been the judicial understanding of "newspaper." For example, in *Friedman's Express, Inc.* v. *Mirror Transp. Co.*, 71 F. Supp. 991 (D.N.J. 1947), *aff'd*, 169 F.2d 504 (3d Cir. 1948), construing the definition of "newspaper" in the federal Motor Carrier Act, the court reminded:

> "The proportion of news items to advertisements and special features varies with different papers; and in the Sunday issues of Metropolitan journals which are imposing in bulk, if not always in contents, the proportion of news to the rest of the printed and pictured matter is but small. News of world-shattering import will be conveyed to readers in far less space than is occupied in calling attention to contraptions for shapely confinement of the female figure, or for perfumes guaranteed to slay the most recalcitrant misogynist, or for conveying the reminder that even your best friends won't tell you. Reports of discussions at the United Nations Organization or Ecclesiastical synods yield in amount of line-space to paid recital of the ultimate in boudoir furnishings or kitchen equipment. The greater part of the matter furnished for the edification of the Sunday newspaper reader is concerned with salesmanship, fiction and mental titillators rather than the exposition of news."

As Judge Learned Hand observed, "That paper may print it verbatim, or a summary of it, or a part of it. The last two are certainly as authentically new and original as the dispatch itself . . . ." *United States* v. *Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept.* v. *Mosley*, 408 U.S. 92, 95 (1972). Any regulation based on a newspaper's "selection of news stories," this Court has held, "would be incompatible with the First Amendment." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n*, 413 U.S. 376, 385 (1973). Yet here the statute improperly "exact[ed] a penalty on the basis of the content of a newspaper." *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 256 (1974); see also *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 88 (1980).

The Chief Justice recognized and warned about the danger of picking and choosing among publications in *First National Bank* v. *Bellotti*, 435 U.S. 765, 801 (1978) (concurring opinion):

> "The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country."

The same had been earlier recognized in *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936), where this Court unanimously struck down a tax that had been enacted "with the plain purpose of penalizing the publishers and curtailing the circulation of *a selected group of newspapers.*" 297 U.S. at 251 (emphasis supplied). In *Winters* v. *New York*, 333 U.S. 507, 510 (1948), this Court recognized that "[t]he line between the informing and the entertaining is too elusive" to permit the legal status of publications to hinge on such distinctions. And in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 346 (1974), this Court rejected a proposal that courts should decide "which publications address issues of 'general or public interest'" because, it said, "We doubt the wisdom of committing this task to the conscience of judges."

Earlier this year, in *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner*, 103 S.Ct. 1365 (1983), this Court reminded that a statute violates the First and Fourteenth Amendments when it "targets individual publications within the press." 103 S.Ct. at 1376. There Minnesota "has created a special tax that applies *only to certain publications* protected by the First Amendment." 103 S.Ct. at 1370 (emphasis supplied). As this Court emphatically concluded:

> "[W]e think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it *singles out a few members of the press* presents such a potential for abuse that *no interest suggested by Minnesota can justify the scheme.*" 103 U.S. at 1375 (emphasis supplied).

**C. The Statute As Applied To Exclude This Weekly Tabloid Is Void for Vagueness.**

It is of course well established that a newspaper has a First Amendment right to decline to publish material. *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974). No authority could have *required* the *National Enquirer* to print the retraction that it published here.

However, brandishing and invoking explicitly the provisions of § 48a, see p. 4, *supra*, Appellee's counsel demanded a retraction "in the manner provided for in Section 48(a) [*sic*] of the Civil Code of the State of California." Reasonably relying on being covered by § 48a, the *Enquirer* promptly complied and printed a retraction and apology, giving up its First Amendment right recognized in *Tornillo*.[23] It did so on the under-

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[23] Pp. 4-5, *supra*. Because the trial court held that § 48a excludes the *National Enquirer*, the adequacy of the retraction under § 48a was never put to the jury. The dicta of both courts below (pp. 25a, 56a, *infra*), complaining that the retraction was insufficiently abject, we believe simply do not bear scrutiny. A comparison of the retraction the trial court said would have been adequate, p. 64a, *infra*, with the one that was printed, p. 4, *supra*, speaks for itself, particularly when compared to the much more cursory "corrections" that appear in most newspapers nearly every day.

standing that thereby its potential liability for general and punitive damages would be eliminated. As the Supreme Court of California has explained, "the retraction provisions of section 48a provide a reasonable substitute for general damages . . . ." *Werner* v. *Southern California Associated Newspapers*, 35 Cal. 2d 121, 126, 216 P.2d 825, 828 (1950), *appeal dismissed on appellant's motion*, 340 U.S. 910 (1951).

Now California has held that, contrary to what everyone long thought,[24] the statute's protection does not extend to this tabloid at all. But a statute that by the uncertainty of its terms and application causes First Amendment rights to be lost is itself void for vagueness under both the free speech and due process guarantees incorporated in the Fourteenth Amendment.

> "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely . . . ." *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966) (footnote omitted).

*Accord*, *NAACP* v. *Button*, 371 U.S. 415, 432-33, 438 (1963); *Smith* v. *California*, 361 U.S. 147, 151 (1959); *Winters* v. *New York*, *supra*. A statute is unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." *Baggett* v. *Bullitt*, 377 U.S. 360, 367 (1964); see also *Bouie* v. *City of Columbia*, *supra*. Vagueness is also particularly intolerable when punishment is at stake. See, *e.g.*, *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939). Appellant's First Amendment rights were sacrificed here because of the vagueness of the statute. And "[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations . . . ." *Tornillo*, *supra*, 418 U.S. at 256.

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[24] The trial court recognized, "apparently I've caught you by surprise." P. 49a, *infra*. As earlier noted, the trial court had twice earlier ruled in this very case that the *Enquirer* was protected by § 48a. See pp. 4-5, *supra*.

## II. BY HOLDING THAT THE FIRST AMENDMENT PERMITS PUNITIVE DAMAGES FOR A PUBLIC FIGURE IN A LIBEL CASE—WHEN HATRED, ILL WILL AND DAMAGE TO REPUTATION ALL WERE ABSENT—THE DECISION CONFLICTS WITH HOLDINGS OF THREE STATE COURTS AND WITH THE CLEAR IMPLICATION OF DECISIONS OF THIS COURT.

Whether punitive damages, with their vast latitude for punishing unpopular opinion, are tolerable under the First and Fourteenth Amendments in a libel case brought by a public figure is an issue left unsettled by *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). The American Law Institute recognizes that "[a]n authoritative determination . . . awaits further action by the Court." RESTATEMENT (2D), TORTS, § 621, comment *d* (1977). Also totally unsettled, if punitive damages are in some instances to be permitted, is the question of what constitutional standards govern their application in suits by public figures. For here it is undisputed that there was no hatred or ill will by the publisher. As Appellee's counsel stated at trial,

> "I'm not . . . saying that these people [Appellant] . . . have any actually [*sic*] ill will."

No damage to reputation was claimed, either. Appellee's counsel stated: "the only damages we are talking about in this case, the only relevant damages, are general damages for emotional distress." But he added: "the first two items [special and general damages] have to do with Carol's case, what she's lost. *The second part* [punitive damages] *is really against the National Enquirer.*" (Emphasis supplied.)

### A. The State Courts Are in Conflict.

In square conflict with the decision below, three states have held that the First and Fourteenth Amendments bar punitive damages in libel actions for public figures

who recover adequate compensatory damages.[25] In *Sprouse* v. *Clay Communication, Inc.*, 211 S.E.2d 674 (W .Va.), *cert. denied*, 423 U.S. 882 (1975), the Supreme Court of West Virginia in disallowing punitive damages did so because they "would have a chilling effect upon the legitimate exercise of First Amendment rights and would lead to the type of self-censorship which has been the object and purpose of the United States Supreme Court to prevent since New York Times v. Sullivan, *supra*." 211 S.E.2d at 692. That court's reasoning was adopted by Louisiana in *McHale* v. *Lake Charles American Press*, 390 So.2d 556, 570 (La. App. 1080), *cert. denied*, 452 U.S. 941 (1981). The Supreme Judicial Court of Massachusetts likewise has held punitive damages barred, resting its holding on both state grounds and federal constitutional policy:

> "We reject the allowance of punitive damages in this Commonwealth in any defamation action, on any state of proof, whether based in negligence, or reckless or wilful conduct. We so hold in recognition that the possibility of excessive and unbridled jury verdicts, grounded on punitive assessments, may impermissibly chill the exercise of First Amendment rights by promoting apprehensive self-censorship." *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 860, 330 N.E.2d 161, 169 (1975).

Thus, as the law now stands after the decision below, public-figure libel plaintiffs in California may obtain punitive damages without even proving a publisher's ill

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[25] In addition, at least two states have held that punitive damages in libel cases are barred by the free-speech and free-press guarantees of their own constitutions. *Hall* v. *May Dept. Stores*, 292 Ore. 131, 637 P.2d 126 (1981); *Taskett* v. *KING Broadcasting Co.*, 86 Wash. 2d 439, 546 P.2d 81 (1976). Two more states have held that punitive damages for libel are barred by their constitutions unless there is proof (concededly absent here) that the publisher acted with actual hatred or ill will. *AAFCO Heating & Air Conditioning Co.* v. *Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976); *Walker* v. *Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975).

will, but in other states they are held barred by the United States Constitution from any punitive award at all. And to the extent that libel plaintiffs may have a choice of states in which to sue, *cf. Keeton* v. *Hustler Magazine, Inc.*, No. 82-485, they will be able to select those where punishment of publishers is encouraged. That is an intolerable conflict among the states on a matter of federal constitutional law. It is unfair to plaintiffs and defendants alike. Only this Court can resolve it.

**B. On the Broad Instructions Approved Here, Punitive Damages Unconstitutionally Punish for Legal Expression by Unpopular Publishers.**

The trial court advised the jury, in an instruction which the Court of Appeals approved, that the malice required for an award of punitive damages was simply "conduct . . . carried on by the defendant with a conscious disregard for the rights of others," and that this might be established by a simple preponderance of the evidence. The court added:

> "The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice."

We cannot state the constitutional problem raised by such instructions any better than this Court did in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974):

> "In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views."

Anomalous as they are in other contexts, punitive damages are particularly bizarre and dangerous when applied to First Amendment conduct. The stated purpose of punitive—"exemplary"—damages is punishment and deterrence. See, *e.g.*, *City of Newport* v. *Fact Concerts, Inc.*,

453 U.S. 247, 266-67 (1981).[26] Punitive damages can indeed set an example, and that example chills others, and with them a wide swath of speech and press activities.[27] Yet the rule this Court has consistently applied under the First Amendment is that lawful speech must *not* be deterred, and that speech may be regulated only by clearly defined and evenhanded standards. See, *e.g.*, *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *NAACP* v. *Button*, 371 U.S. 415 (1963). This Court has struck down procedures that "create the danger that the legitimate utterance will be penalized." *Spieser* v. *Randall*, 357 U.S. 513, 526 (1958). Punitive damages are the only instances in which some courts routinely *endorse* the chilling of First Amendment freedoms.

The threat of unlimited punitive damages is particularly troublesome to publishers because, unlike compensatory damages, punitive awards are unpredictable in amount, and so the degree of care in preparing a story cannot be related to the potential risk. (Here, for example, the plaintiff concededly suffered no damage except alleged emotional distress, yet the punishment imposed by the jury was $1,300,000.) Punitive awards thus habitually violate the constitutionally mandated requirement of proportionality in punishment. See *Solem* v. *Helm*, 103 S.Ct. 3001 (1983). Unpredictability is heightened because in many states, including California, a publisher cannot insure against punitive damages. A single un-

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[26] There is no doubt that "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." *Bell* v. *Wolfish*, 441 U.S. 520, 539 n.20 (1979). Punitive damages "are private fines." *Gertz* v. *Robert Welch, Inc.*, *supra*, 418 U.S. at 350. In California they "are assessed to punish the defendant and not to compensate for any loss suffered by the plaintiff." *Brewer* v. *Second Baptist Church*, 32 Cal. 2d 791, 801, 197 P.2d 713, 720 (1948).

[27] Based upon economic analysis of their overbroad deterrent effect, Judge Posner has concluded that in libel cases "punitive damages should be disallowed." R. POSNER, ECONOMIC ANALYSIS OF LAW 543 (2d ed. 1977).

expected verdict may cripple a publisher.[28] At the same time, the hope of large windfalls encourages plaintiffs to file suits.

The greatest danger, of course, is that punitive damages will be used for arbitrary punishment of unpopular publishers and unpopular views. To permit such fines "licenses the jury to create its own standard in each case." *Herndon* v. *Lowry*, 301 U.S. 242, 263 (1937). Again, this Court has succinctly stated the problem: "it cannot be ignored that punitive damages may be employed to punish unpopular defendants." *IBEW* v. *Foust*, 442 U.S. 42, 50-51 n.14 (1979). That is exactly what happened at the trial in this case. Having been told that "The second part is really against the National Enquirer," the jury came back with a grotesque verdict of $1,300,000 punitive damages. The trial judge then filed an opinion explaining that he did not approve of the *Enquirer* either, and, although cutting the amount, that he believed that punishment was appropriate because of distaste for the *Enquirer*'s "style of journalism," which the court described as "legalized pandering designed to appeal to the readers' morbid sense of curiosity." P. 60a, *infra*. In other words, the trial court was willing to punish for "style," and for publications not even at issue in this case—conduct which the court itself described as "legalized." The fact that Appellee rejected as insufficient a punitive award of $150,000, and instead

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[28] See, for example, the $2.5 million punitive libel verdict against the Alton (Ill.) *Telegraph*. *Cf. Green* v. *Alton Telegraph Printing Co.*, 107 Ill. App. 3d 755, 438 N.E.2d 203 (1982). As the *Wall Street Journal* noted,

> "First Amendment advocates often warn of the subtle intimidation of libel suits—the 'chilling effect,' as they call it. But for small newspapers, there's nothing subtle about it. As the Telegraph case shows, a costly court fight can frighten editors, discourage reporters, saddle a business with debt and even drive families apart."

Curley, *How Libel Suit Sapped The Crusading Spirit Of a Small Newspaper*, Wall Street Journal, Sept. 29, 1983, p. 1, col. 1.

chose a new trial limited to punishment, does not solve the problem, because the court below in its opinion approved every instruction and action by the trial court except the amount of punishment.

We do not argue here that there can never be punitive damages on proper instructions as an adjunct to compensatory damages in a libel case. What we do believe this Court's decisions clearly imply at a minimum is that a windfall punitive award should not be recoverable by a public figure merely on showing of "conscious disregard for the rights of others" by mere preponderance of the evidence. Instead, the requirement in most states—and the requirement that this Court in speech cases always has assumed applied [29]—is that the publisher must be shown to have acted out of *hatred or ill will* toward the plaintiff. That, this Court has recognized, is "the common-law standard of 'malice' generally required under state tort law to support an award of punitive damages." *Cantrell* v. *Forest City Pub. Co.*, 419 U.S. 245, 252 (1974); *accord*, *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981); *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130, 161 (1967) (plurality opinion). That is consistent with this Court's holding that publication cannot be punished except when the publisher has notice of wrongdoing. *Smith* v. *California*, 361 U.S. 147 (1959). That is also consistent with this Court's recognition in *Gertz* v. *Robert Welch, Inc.*, *supra*, that for private figures punitive damages require a greater showing of misconduct than compensatory damages. The same should be true for public figures—a greater showing of misconduct for punitive damages should be required, *i.e.*, hatred or ill will—or else the First Amendment's protection as a practical matter is eviscerated.

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[29] *Smith* v. *Wade*, 103 S.Ct. 1625 (1983), which did not require a higher degree of fault for punitive damages in interpreting a federal civil rights statute, was not a First Amendment case, and this Court explicitly recognized that its holding did not apply to First Amendment cases. See 103 S.Ct. at 1639 n.19.

The impact of the constitutional decision below is potentially staggering. If, contrary to what this Court has heretofore assumed, there need be no showing of ill will before publishers can be punished for libel of public figures, then the press can routinely expect to pay punitive damages in nearly every libel action. And assuming that the standard for public figures will apply also to public officials, then public officials will be able not just to obtain compensation, but to *punish* even those who write about them without ill will—and something very close to the law of seditious libel will have been restored, with publishers publishing "on pain of libel judgments virtually unlimited in amount." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964).

**C. The Issue Is One Which Has Not Been, But Should Be, Decided By This Court.**

Windfall punitive damages now are gyrating out of control, destroying all certainty and altering the very fabric of our legal system.[30] As one California Justice recently remarked,

> "I am fearful that the law of punitive damages as it has developed in this state no longer serves any public policy, or the legitimate interests of the unentitled recipients of its constantly accelerating largess." [31]

This Court too has recognized the anomalous nature of punitive damages. In *Smith* v. *Wade*, 103 S.Ct. 1625 (1983), Mr. Justice Rehnquist joined by the Chief Justice and Mr. Justice Powell in dissent reviewed the vehement

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[30] See, *e.g.*, Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So. Cal. L. Rev. 1, 2 (1982) ("Punitive damages are being sought and awarded in a growing number of cases, often for substantial amounts") (footnote omitted); Curley, *supra* note 28.

[31] *Rosener* v. *Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 758, 168 Cal. Rptr. 237, 248 (1980), *appeal dismissed*, 450 U.S. 1051 (1981) (Elkington, J., concurring). See generally Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 279 (1983); Hill, *Defamation and Privacy Under the First Amendment*, 76 Colum. L. Rev. 1205, 1253 (1976).

criticisms of what one court called a "monstrous heresy." *Fay* v. *Parker*, 53 N.H. 342, 382 (1872); see 103 S.Ct. at 1641. This Court expressed concern in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the harm caused." In *Smith* v. *Wade*, *supra*, this Court included a clear caution that "we intimate no view on any First Amendment issues [punitive damages] . . . may raise." 103 S.Ct. at 1639 n.19. But the court below ignored that warning, because it saw in this Court's holdings only "a wide spectrum of opinion concerning the propriety of punitive damages in instances like the one before us." P. 26a n.12, *infra*. Other courts, by contrast, have doubted whether punitive damages are allowable to public figures in libel cases at all.[32]

This Court never has approved punitive damages in a case like the present one. Only once has this Court upheld an award of punitive damages in a defamation case involving a public figure at all. That was in *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130 (1967), a holding that did not command any opinion of the Court. *Butts*, however, does not support the decision below, because in *Butts* it was explicity assumed that "*punitive damages require a finding of 'ill will'* . . . ." 388 U.S. at 161 (plurality opinion) (emphasis supplied). Moreover, Mr. Justice Harlan, author of the plurality opinion in *Butts*, later came to advocate close restrictions on punitive damages in defamation cases, commenting that "matters are in flux" and that in *Butts* "my earlier opinion painted with somewhat too broad a brush." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 72 n.3 (1971) (Harlan, J., dissenting). And

[32] *E.g.*, the Second Circuit in *Buckley* v. *Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977): "It may be that *Gertz* . . . and its underlying concern lest punitive damages be used 'selectively to punish expressions of unpopular views' especially with 'the wholly unpredictable amounts' that can be awarded will ultimately lead the Supreme Court to hold that punitive damages cannot constitutionally be awarded to a public figure." 539 F.2d at 897.

*Gertz* v. *Robert Welch, Inc.*, *supra*, limiting punitive damages in defamation actions by private figures, expressed deep misgivings about punitive damages in other defamation contexts as well. No decision of this Court has ever approved an award of punitive damages to a public-figure libel plaintiff where concededly hatred and ill will were absent. On the contrary, this Court has held that speech may not be punished by a statute "eliminating all mental elements from the crime." *Smith* v. *California*, *supra*, 361 U.S. at 155.

The present appeal captures in starkest form what punitive damages against a publisher really are about. The court below, by its order commanding that a new trial be held for punitive damages alone, has directed that a publisher stand trial civilly *solely* for the purpose of determining *punishment* for a publication. This Court has never approved, or even had occasion to approve, a *civil* trial of a publisher *solely* for purposes of *punishment*. Instead, it has repeatedly expressed warnings that usually speech "is . . . inappropriate for penal control." *Garrison* v. *Louisiana*, 379 U.S. 64, 70 (1964). Certainly there is no overwhelming interest of the state necessitating such a strange punitive proceeding. As this Court observed in *Gertz* v. *Robert Welch, Inc.*, *supra*, "the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury." 418 U.S. at 349.[33]

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[33] California's own policy, as reflected in its Penal Code, sets a maximum fine for criminal libel of $5,000. CAL. PENAL CODE § 249. Indeed, the court below earlier held that criminal punishment provision unconstitutional under the First and Fourteenth Amendments. *Eberle* v. *Municipal Court*, 55 Cal. App. 3d 423, 127 Cal. Rptr. 594 (1976). A trial based on affirmance of the liability finding is inappropriate also because the court below recognized that the jury had been motivated by passion or prejudice. P. 24a, *infra*. As a matter of due process, that tainted the entire verdict. *Minneapolis, St. P. & S. Ste. M. Ry.* v. *Moquin*, 283 U.S. 520 (1931).

If there is to be a trial of a publisher in which the only issue is punishment, then although due process may not necessarily require all the safeguards of a criminal trial, see generally *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976); *United States* v. *Ward*, 448 U.S. 242 (1980), it certainly should include at least the requirements of clear standards and a more demanding standard of proof than mere preponderance of the evidence. *Cf. In re Winship*, 397 U.S. 358 (1970); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). Here to punish speech "the State has . . . eliminated the safeguards of the criminal process." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 69-70 (1963). Its interest in totally doing so is too slight to overcome the constitutional policies of the First, Fifth, Eighth [34] and Fourteenth Amendments.

## CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted,

JOHN G. KESTER *
HAROLD UNGAR
Hill Building
Washington, D.C. 20006
(202) 331-3069
*Attorneys for Appellant*

*Of Counsel:*
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006
* Counsel of Record

December 30, 1983

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[34] It has been recognized that unjustified awards of punitive damages may also violate the Eighth Amendment's prohibition of "excessive fines." *Toepleman* v. *United States*, 263 F.2d 697, 700 (4th Cir.), *cert. denied*, 359 U.S. 989 (1959).

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No. ——

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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NATIONAL ENQUIRER, INC.,
*Appellant,*

v.

CAROL BURNETT,
*Appellee.*

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**On Appeal from the Califorinia Court of Appeal, Second Appellate District**

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## APPENDIX TO STATEMENT AS TO JURISDICTION

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JOHN G. KESTER *
HAROLD UNGAR
Hill Building
Washington, D.C. 20006
(202) 331-3069
*Attorneys for Appellant*

*Of Counsel:*

WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## APPENDIX

## APPENDIX A

**Opinion and Judgment of the California Court of Appeal, Second Appellate District**

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*CERTIFIED FOR PUBLICATION*

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

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2D Civ. No. 66447

(Super.Ct.No. C157213)

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CAROL BURNETT,
*Plaintiff and Respondent,*

v.

NATIONAL ENQUIRER, INC.,
*Defendant and Appellant.*

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[Court of Appeal-Second Dist., Filed, July 18, 1983,
Clay Robbins, Jr., Clerk]

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APPEAL from a judgment of the Superior Court of Los Angeles County. PETER S. SMITH, Judge. The judgment is affirmed except that the punitive damage award herein is vacated and the matter is remanded for a new trial on that issue only, provided that if respondent shall, within 30 days from the date of our remittitur, file with the clerk of this court and serve upon appellant a written consent to a reduction of the punitive damage award to the sum of $150,000 the judgment will be modi-

fied to award respondent punitive damages in that amount, and as so modified affirmed in its entirety.

WILLIAMS & CONNOLLY, By: JOHN G. KESTER, HAROLD UNGAR; SELVIN & WEINER, By: PAUL P. SELVIN, for Defendant and Appellant.

BARRY B. LANGBERG, STEPHEN S. MONROE, PAUL S. ABLON, RICHARD P. TOWNE, HAYES & HUME, for Plaintiff and Respondent.

JACK C. LANDAU, JUDY D. LYNCH; PIERSON, BALL AND DOWD, By: J. LAURENT SCHARFF, for Amici Curiae.

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On March 2, 1976, appellant caused to appear in its weekly publication, the National Enquirer, a "gossip column" headlined "Carol Burnett and Henry K. in Row," wherein a four-sentence item specified in its entirety that:

> "In a Washington restaurant, a boisterous Carol Burnett had a loud argument with another diner, Henry Kissinger. Then she traipsed around the place offering everyone a bite of her dessert. But Carol really raised eyebrows when she accidentally knocked a glass of wine over one diner and started giggling instead of apologizing. The guy wasn't amused and 'accidentally' spilled a glass of water over Carol's dress."

Maintaining the item was entirely false and libelous,[1] an attorney for Ms. Burnett, by telegram the same day and by letter one week later, demanded its correction or retraction "within the time and in the manner provided

[1] "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Civ. Code, § 45.)

for in Section 48(a) of the Civil Code of the State of California," failing which suit would be brought by his client [respondent herein], a well known actress, comedienne and show-business personality.

In response to the demand, appellant on April 6, 1976, published the following retraction, again in the National Enquirer's gossip column:

> "An item in this column on March 2 erroneously reported that Carol Burnett had an argument with Henry Kissinger at a Washington restaurant and became boisterous, disturbing other guests. We understand these events did not occur and we are sorry for any embarrassment our report may have caused Miss Burnett."

On April 8, 1976, respondent, dissatisfied with this effort in mitigation, filed her complaint for libel in the Los Angeles Superior Court. Trial before a jury resulted in an award to respondent of $300,000 compensatory damages and $1,300,000 punitive damages. The trial court by remittitur thereafter rendered its judgment in respondent's favor for $50,000 compensatory and $750,000 punitive damages. This appeal followed.

As formulated by appellant, apart from two claimed irregularities occurring upon the trial, the principal issues here are whether the National Enquirer is excluded from the protection afforded by Civil Code section 48a,[2]

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[2] "§ 48a. Libel in newspaper; slander by radio broadcast.

"1. Special damages; notice and demand for correction. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowl-

and whether the damage award and penalty specified in the judgment can stand.

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edge of the publication or broadcast of the statements claimed to be libelous.

"2. General, special and exemplary damages. If a correction be demanded within said period and be not published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as were the statements claimed to be libelous, in a regular issue thereof published or broadcast within three weeks after such service, plaintiff, if he pleads and proves such notice, demand and failure to correct, and if his cause of action be maintained may recover general, special and exemplary damages; provided that no exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication or broadcast "with actual malice and then only in the discretion of the court or jury, and actual malice shall not be inferred or presumed from the publication or broadcast.

"3. Correction prior to demand. A correction published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as the statements claimed in the complaint to be libelous, prior to receipt of a demand therefor, shall be the same force and effect as through such correction had been published or broadcast within three weeks after a demand therefor.

"4. Definitions. As used herein, the terms 'general damages,' 'special damages,' 'exemplary damages' and 'actual malice,' are defined as follows:

"(a) 'General damages' are damages for loss of reputation, shame, mortification and hurt feelings;

"(b) 'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he had expended as a result of the alleged libel, and no other;

"(c) 'Exemplary damages' are damages which may in the discretion of the court or jury be recovered in addition to general and special damages for the sake of example and by way of punishing a defendant who has made the publication or broadcast with actual malice;

"(d) 'Actual malice' is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice."

Prior to addressing the merits of appellant's contentions and in aid of our disposition, we set out the following further facts pertaining the publication complained of and descriptive of the nature and character of the National Enquirer, which were adequately established in the proceedings below.

On the occasion giving rise to the gossip column item hereinabove quoted, respondent, her husband and three friends were having dinner at the Rive Gauche restaurant in the Georgetown section of Washington, D.C. The date was January 29, 1976. Respondent was in the area as a result of being invited to be performing guest at the White House. In the course of the dinner, respondent had two or three glasses of wine. She was not inebriated. She engaged in banter with a young couple seated at a table next to hers, who had just become engaged or were otherwise celebrating. When curiosity was expressed about respondent's dessert, apparently a chocolate souffle, respondent saw to it the couple were provided with small amounts of it on plates they had passed to her table for the purpose. Perhaps from having witnessed the gesture, a family behind respondent then offered to exchange some of their baked alaska for a portion of the souffle, and they, too, were similarly accommodated. As respondent was later leaving the restaurant, she was introduced by a friend to Henry Kissinger, who was dining at another table, and after a brief conversation, respondent left with her party.

There was no "row" with Mr. Kissinger, nor any argument between the two, and what conversation they had was not loud or boisterous. Respondent never "traipsed around the place offering everyone a bite of her dessert," nor was she otherwise boisterous, nor did she spill wine on anyone, nor did anyone spill water on her and there was no factual basis for the comment she "* * * started giggling instead of apologizing."

The impetus for what was printed about the dinner was provided to the writer of the item, Brian Walker, by Couri Hays [*sic*], a freelance tipster paid by the National Enquirer on an ad hoc basis for information supplied by him which was ultimately published by it, who advised Walker he had been informed respondent had taken her Grand Marnier souffle around the restaurant in a boisterous or flamboyant manner and given bites of it to various other people; that he had further but unverified information respondent had been involved in the wine-water spilling incident; but that, according to his sources, respondent was "specifically, emphatically" not drunk. No mention was made by Hays [*sic*] of anything involving respondent and Henry Kissinger.

Having received this report, Walker spoke with Steve Tinney, whose name appears at the top of the National Enquirer gossip column, expressing doubts whether Hays could be trusted. Tinney voiced his accord with those doubts. Walker than asked Gregory Lyon, a National Enquirer reporter, to verify what Walker had been told by Hays [*sic*]. Lyon's inquiry resulted only in his verifying respondent had shared dessert with other patrons and that she and Kissinger had carried on a good natured conversation at the restaurant.

In spite of the fact no one had told him respondent and Henry Kissinger had engaged in an argument, that the wine-water spilling story remained as totally unverified hearsay, that the dessert sharing incident was only partially bolstered, and that respondent was not under any view of the question inebriated, Walker composed the quoted item and approved the "row" headline.

The National Enquirer is a publication whose masthead claims the "Largest Circulation Of Any Paper in America." It is a member of the American Newspaper Publishers Association. It subscribes to the Reuters News Service. Its staff call themselves newspaper reporters. It describes its business as "newspaper" in its filings

with the Los Angeles County Assessor and in its applications for insurance. A State Revenue Department has ruled it qualifies as a newspaper and is thus exempt from sales and use tax. The United States Department of Labor describes it as "belonging to establishments primarily engaged in publishing or printing and publishing newspapers."

By the same token the National Enquirer is designated as a magazine or periodical in eight mass media directories and upon the request and written representation of its general manager in 1960 that "In view of the feature content and general appearance [of the publication], which differ markedly from those of a newspaper * * *," its classification as a newspaper was changed to that of magazine by the Audit Bureau of Circulation. It does not subscribe to the Associated Press or United Press International news services. According to a statement by its Senior Editor it is not a newspaper and its content is based on a consistent formula of "how to" stories, celebrity or medical or personal improvement stories, gossip items and TV column items, together with material from certain other subjects. It provides little or no current coverage of subjects such as politics, sports or crime, does not attribute content to wire services, and in general does not make reference to time. Normal "lead time" [3] for its subject matter is one to three weeks. Its owner allowed it did not generate stories "day to day as a daily newspaper does."

*Did the trial court err in holding the National Enquirer was not a newspaper within the provisions of Civil Code § 48a? No.*

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[3] If a "deadline" is the time by which an article must be placed in the printing process in order to be completed for distribution, by one accepted definition "lead time" is the period from the deadline to such point of completion, or, put another way, is the shortest period of time between completion of an article and the time it is published.

At appellant's request, the trial court herein made its determination [4] after hearing and based on extensive evidence that the National Enquirer was not a newspaper for purposes of the application of Civil Code section 48a (see fn. 2).

In so concluding, while it took into account the indicia relating to status detailed above, it relied upon the most fundamental of those considerations which have been deemed sufficient to justify the designation of that particular class as the beneficiary of the protection by the statute, namely, that newspapers by virtue of the manner in which they are obliged to operate are not generally in a position adequately to guard against the publication of material which is untrue, such that:

> "In view of the complex and far-flung activities of the news services upon which newspapers and radio

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[4] The determination referred to is that ultimately made immediately prior to trial. Earlier, in January of 1980, appellant moved for partial summary judgment on the ground the "hatred or ill will" required to be shown under § 48a (see fn. 3) could not be established by respondent, thereby preclude punitive damages. That motion was granted. In February 1980, respondent moved to modify or vacate the order. After consideration of this motion, the prior order was modified to state that a triable issue of fact existed whether "hatred or ill will" could be shown but that as a matter of law the National Enquirer was a newspaper "within the meaning of newspaper as said term is contained in Civil Code § 48(a)."

Within six months following the modification, respondent moved to vacate both prior rulings and this motion was granted upon the premise "the issue of whether or not defendant National Enquirer is a newspaper or magazine for purposes of Civil Code § 48(c) and this action is a triable issue of fact which shall be determined upon trial."

While appellant now suggests the "newspaper" issue should at least have been submitted to the jury, its trial brief on the point specifically concluded that "The question of the newspaper or magazine status of The National Enquirer under Civil Code § 48(a) is one for the Court. *Montandon* v. *Triangle Publications, Inc.*, 45 Cal.App.3d 938, 953 (1975)."

> stations must largely rely and the necessity of publishing news while it is new, newspapers and radio stations may in good faith publicize items that are untrue but whose falsity they have neither the time nor the opportunity to ascertain." (*Werner* v. *Southern Cal. etc. Newspapers* (1950) 35 Cal.2d 121, 128).

The preferred status thus being seen as hinging on the inability of newspapers to verify information while optimally disseminating news, the trial court focused on the element of time as that element was related to appellant's publication process or business mode and found crucial to its determination the National Enquirer should not be characterized as a newspaper evidence showing the reason for that preferred status to be lacking.

Appellant contends the rationale so employed by the trial court was erroneous and in support of the claim maintains that the special classification approved in *Werner* v. *Southern Cal. etc. Newspapers, supra*, 35 Cal. 2d 121, depended on the public's interest in the "free dissemination of news," without reference to questions of timeliness; that the cases of *Pridonoff* v. *Balokovich* (1951) 36 Cal.2d 788 (§ 48a to be applied in favor of all participants—e.g., columnists, critics, editors—in newspaper publications), *Maidman* v. *Jewish Publications, Inc.* (1960) 54 Cal.2d 643 (§ 48a applicable to weekly newspaper), *Kapellas* v. *Kofman* (1969) 1 Cal.3d 20 (§ 48a applicable to editorial) and *Field Research Corp.* v. *Superior Court* (1969) 71 Cal.2d 110, 114 fn. 4 (language in footnote implying § 48a applies to "publishing * * * enterprises") constitute an unbroken line of authority consistent with appellant's position; and that *Briscoe* v. *Reader's Digest Assn.* (1971) (§ 48a applicable to the named defendant) "clearly [holding] § 48a applicable to a magazine—indeed to a monthly magazine that published digests of other magazine articles, rather than current happenings," requires a like result with re-

spect to the National Enquirer. Further support for the conclusion, it is said, derives from language appearing in *Johnson* v. *Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 894, and *Harris* v. *Curtis Publishing Co.* (1942) 49 Cal.App.2d 340, 353-354.

An understanding of the pertinent authorities differing from that so proffered by appellant, however, appears in *Morris* v. *National Federation of the Blind* (1961) 192 Cal.App.2d 162 and in *Montandon* v. *Triangle Publications, Inc.* (1975) 45 Cal.App.3d 938 (hg. den. 5-8-75). In *Morris*, the court examined the issue in terms of a newspaper-magazine dichotomy, and observed that:

> [T]he statute [§ 48a] on its face applies only to publication 'in a newspaper, or . . . by radio broadcast.' No California decision has specifically determined whether this provision applies also to magazines. However, our Supreme Court, in holding the statute constitutional, has noted the interest of the public in the free dissemination of news (*Werner* v. *Southern Calif. etc. Newsapers*, 35 Cal.2d 121, 128 * * *). Particular emphasis was placed upon the pressures upon media of news dissemination for publishing 'news while it is new,' and the resultant limitation of time and opportunity for ascertaining the compete accuracy of all items printed. Both dissenting opinions (pp. 138, 153) asserted arbitary and discriminatory classification in the omission of magazines from the protected group. Law review comment has assumed the exclusion of magazines from protection (64 Harv. L. Rev., 678, 679).
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> "Although one decision (*Harris* v. *Curtis Publishing Co.*, 49 Cal.App.2d 340, 353-354 * * *) has assumed application of section 48a to magazines, it does not discuss the point, which apparently was not raised by the briefs. Another (*Shumate* v. *Johnson Publishing Co.*, 139 Cal.App.2d 121, 129-130 * * *

implies that the statute does not extend to magazines. * * *.

* * * *

"On full review of the statute, we conclude that it applies only to a publication in a newspaper or by radio. Its terms are clear. The Legislature conspicuously failed to include magazines in the protected group. We are bound by this apparently intended omission. Extension of the statute requires amendment rather than interpretation."

(*Morris* v. *National Federation of the Blind*, *supra*, 192 Cal.App.2d 162, 165-166.)

Employing a similar analysis, the court in *Montandon* agreed with the conclusion reached in *Morris*. In doing so, however, it was further obliged to confront the intervening and apparently contrary holding in *Briscoe* v. *Reader's Digest Association, Inc.*, *supra*, 4 Cal.3d 529, which it rationalized as follows:

"In *Briscoe* v. *Reader's Digest Association, Inc.* (1971) 4 Cal.3d 529 * * *, an action against the publisher of Reader's Digest for invasion of plaintiff's right of privacy by publishing the fact that some 11 years prior to the publication he had hijacked a truck and fought a gun battle with police, the trial court sustained without leave to amend a demurrer to the complaint. The Supreme Court reversed, holding that the complaint did state a cause of action for invasion of privacy by publication of plaintiff's name in the article. The court stated further that allegations in the complaint were not sufficient to state a 'false light' cause of action, one which is in substance equivalent to a libel claim, because the plaintiff had not complied with the requirements of section 48a.

"As *Briscoe* involved not a newspaper but a magazine, it would appear that the court was holding that

section 48a applies to a magazine as well as a newspaper. Unfortunately, no discussion appears therein of the cases which hold that the section does not apply to magazines. Nor is there any diccussion of the reasons upon which the holding is based. * * *. Moreover, the court in *Briscoe* cited as the only support for its holding, *Werner*, *supra*, and *Kapellas* v. *Kofman* (1969) 1 Cal.3d 20 * * *, both of which were libel actions against newspapers and contained no discussion of the application of section 48a to magazines.

"Section 48a was originally adopted in 1931 (Stats. 1931, ch. 1018, p. 2034, § 1) and applied only to newspapers. It was amended in 1945 (Stats. 1945, ch. 1489, p. 2763, § 5) to add radio. The statute on its face applied only to '"a newspaper" and radio broadcast.' It is significant in light of the decision in *Morris*, *supra*, in 1961 that the section did not apply to magazines, that the Legislature has not amended it to include magazines. It is also significant that the Legislature in 1949 provided in section 48.5 of the Civil Code that the term 'radio broadcast' as used in part 2 of the code is 'defined to include both visual and sound radio broadcasting.' If, as defendant claims, the Legislature intended to include magazines it has had abundant opportunity to do so.

"In *Briscoe*, *supra*, page 543, the court said: * * * '*We hold today only that, as pleaded, plaintiff has stated a valid cause of action, sustaining the demurrer to plaintiff's complaint was improper, and that the ensuing judgment must therefore be reversed.*' [Italics added.] In view of the "court's statement limiting its opinion to a matter of pleading and the other matters above stated, *Briscoe* cannot be considered as authority for overruling the

determination in *Morris, supra*, page 162, that section 48a does not apply to magazines.[5]

(*Montandon* v. *Triangle Publications, Inc., supra*, 45 Cal.App.3d 938, 951-952 (hg. den. 5-8-75); see also *Alioto* v. *Cowles Communications, Inc.*, 519 F.2d 777 (9th Civ.), *cert. denied*, 423 U.S. 930 (1975); *Cameron* v. *Wernick* (1967) 251 Cal.App.2d 890, 892, fn. 1.)

From the foregoing it would appear no definitive exposition of the scope of § 48a has been articulated sufficiently for us to say the question of its application here is without doubt. We nevertheless are of the opinion that what emerges as the better view from the authorities discussed is the proposition that the protection afforded by

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[5] The *Montandon* court further observed that:

"*Johnson* v. *Harcourt, Brace, Jovanovich, Inc.* (1974), 43 Cal. App.3d 880 * * *, is an action for invasion of the plaintiff's right of privacy by republication of an article from The Nation magazine in a college English textbook. Judgment of the trial court sustaining the defendant's demurrer without leave to amend was affirmed. In the opinion reference is made to *Kapellas, supra*, page 20, and in *Briscoe, supra*, page 529, to the California Supreme Court's determination that a false light action is in substance equivalent to a defamation suit and that a plaintiff alleging false light, therefore, must also satisfy the requirements of malice and demand for retraction within 20 days of notice of the publication. [C]iting Civil Code section 48a the court stated: 'Although *Briscoe* extended the coverage of section 48a to encompass magazines, under the conclusion we here reach we do not determine whether the retraction requirement extends to the publication of books.' (*Johnson, supra*, p. 894.)

"As we have pointed out hereinbefore, we do not consider *Briscoe* as authority for the proposition that section 48a applies to magazines, nor do we consider that the mere reference in *Johnson, supra*, p. 880, to section 48a adds anything to the issue, particularly as the court refused to go into the application of section 48a to books and the question of its application to magazines was not before the court." (*Montandon* v. *Triangle Publications, Inc., supra*, 45 Cal. App.3d 938, 952-953.)

the statute is limited "to those who engage in the immediate dissemination of news on the ground that the Legislature could reasonably conclude that such enterprises * * * cannot always check their sources for accuracy and their stories for inadvertent publication errors * * *." (*Field Research Corp.* v. *Superior Court, supra*, 71 Cal.2d 110, 114.)

Seen in this light, the essential question is not then whether any publication is properly denominated a magazine or by some other designation, but simply whether it ought to be characterized as a newspaper or not within the contemplation of § 48a, a question which must be answered, as the trial court supposed, in terms which justify an expanded barrier against damages for libel in those instances, and those only, where the constraints of time as a function of the requirements associated with production of the publication dictate the result.[6]

Having so decided, we are also satisfied to conclude without extensive recitation of the evidence that the trial court consistently with the foregoing rationale correctly determined the National Enquirer should not be deemed a newspaper for the purposes of the instant litigation.

*Was there error associated with the award to respondent of $750,000 in punitive damages? Yes.*

In order, first, to provide the framework employed by us in rejecting certain contentions raised by appellant

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[6] In so saying we are mindful of the semantic and substantive difficulties inherent in the use in the present context of such words as "immediate" ("timely") and "news," it being the case that the former might be seen as a function of occurrence, or of discovery, or something else and the latter may be regarded as the product of the media, or as dependent for its definition upon the perception of its recipient or delineated in some other fashion. (See generally, *Gertz* v. *Robert Welch, Inc.* (1974) 418 U.S. 323, 346; *Winters* v. *New York* (1948) 333 U.S. 507, 510; *Hannegan* v. *Esquire, Inc.* (1946) 327 U.S. 146, 158; *Goldman* v. *Time, Inc.*, 336 F.Supp. 133, 138 (N.D. Calif. 1971); Restatement, Torts (2d) § 642D, comment g (1977).

under this heading, we set out preliminarily the following considerations and principles fundamental to our conclusions.

Nearly twenty years ago, it was announced in *New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254 at pp. 279-280 that:

> "The constitutional guarantees [relating to protected speech] require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

The constitutional privilege thus defined was extended three years later in *Curtis Publishing Co.* v. *Butts* (1967) 388 U.S. 130, to include within its protection not only public officials but also "public figures," such that:

> "Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth."
>
> (*Gertz* v. *Welch* (1974) 418 U.S. 323, 342.)

What was intended to be accomplished in each of these instances was to make available an "antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander" (*Ibid.*), which rule holds publishers responsible for their false utterances even where an absence of "malice" is positively established, as for example in the case of a defamation which mistakenly or negligently identifies a party as its subject,

"intending" another. (See *Taylor* v. *Hearst* (1895) 107 Cal. 262.)

Finally, in *Gertz* v. *Welch*, *supra*, 418 U.S. 323, because it was thought "the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a *private individual*," (id., at pp. 345-346; emphasis added) a wholesale extension of the *New York Times* test to such persons was rejected as one which would abridge that legitimate state interest to an unacceptable degree, and it was held instead that:

> "* * * so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual,"

but that:

> "* * * the States may not permit recovery of presumed [*i.e.*, compensatory damages without evidence of actual loss] or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."

so that:

> "* * * In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury."
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> (Ibid., at pp. 347, 349, 350; see also *Rosenbloom* v. *Metromedia, Inc.* (1971) 403 U.S. 29.)

These aspects of the scope of the *New York Times* rule having been related, we observe additionally that, as will hereinafter be seen, the reference in the rule to "actual malice" may prove confusing when juxtaposed to similar

terms commonly employed in the law relating to libel,[7] where, as in a case like the one before us, those terms are involved with the question of punitive damages. The difference, nevertheless, between the concept of malice as the term is used respecting *liability* for libel and the meaning of the word as it provides the basis for recovery of punitive *damages* for that tort, at least in California, has been clearly articulated in the case of *Davis* v. *Hearst* (1911) 160 Cal. 143. Thus, it was there pointed out that for purposes of the distinction it is necessary only to define two of the several terms (see fn. 7), namely malice in law and malice in fact, the former being understood as:

> "* * * that malice which the law presumes (either conclusively or disputably) to exist upon the production of certain designated evidence, which malice may be fictional and constructive merely, and which, arising, as it usually does, from what is conceived to be the necessity of proof following a pleading, which in turn follows a definition, is to be always distinguished from true malice or malice in fact."

and the latter referring to:

> "* * * a state of mind arising from hatred or ill-will, evidencing a willingness to vex, annoy, or injure another person,"

*or* to:

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[7] So, it has been remarked that: " 'The jumble in some modern text books on slander and libel concerning malice, actual malice, malice in law, malice in fact, implied malice, and express malice (all derived from judicial utterances, it is true) is a striking testimony of the limitations of the human " 'mind.' *Ullrich* v. *New York Press Co.*, 23 Misc. 168, 171, ***" quoted in *Davis* v. *Hearst* (1911) 160 Cal. 143, 155.)

In the recent case of *Smith* v. *Wade* (1983) —— U.S. ——, 75 L.Ed.2d 632 at p. 640, fn. 6, a matter involving punitive damages under 42 USC § 1983, the majority declined to use the term "actual malice," observing that "While the term may be an appropriate one, we prefer not to use it, simply to avoid the confusion and ambiguity that surrounds the word 'malice'."

> "the motive and willingness to vex, harass, annoy, or injure,"

that is to say to:

> "*malus animus*—indicating that the party was actuated either by spite or ill will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody."
>
> (*Id.*, at pp. 160, 162, 164.)

As illustrative of the respective functions of these terms in a libel case and in amplification of what is meant by malice in fact, the *Davis* court went on to point out that:

> "It has been said that malice is not a necessary ingredient, is no part of the gist or our civil action for [libel]. No particular harm can be worked by the declaration that malice is a necessary part of every action for libel, if it be understood that the particular malice there referred to is the constructive or fictional malice which we have designated malice in law. There is, however, a general provision of the law allowing punitive damages in the discretion of the jury, in an action not arising from contract—in other words, in any action sounding in tort, 'where the defendant has been guilty of * * * malice, express or implied.' (Civ. Code, sect. 3294.) Enough has been said to show what a fertile field for error is the language just quoted, when attempt is made to apply it to malice, express or implied, under all varying definitions.
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> * * * *
>
> "It should be apparent that the malice, and the only malice, contemplated by section 3294 is malice in fact, and that the phrase 'express or implied' has reference only to the evidence by which that malice is established;
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> * * * *

"And while in the cases this malice, the existence of which we have declared to be essential to a recovery in punitive damages, is sometimes called express malice, sometimes actual malice, sometimes real malice, and sometimes true malice, it is always in its analysis malice of the one kind, *the malice of evil motive.* (*Witcher* v. *Jones*, 17 N.Y. Supp. 491; *Union Mutual Life Ins. Co.* v. *Thomas*, 83 Fed. 803, * * *; *Miner* v. *Broadcast Co.*, 170 Mo. 486, * * *; *French* v. *Deane*, 19 Colo. 504, * * *; *Inman* v. *Ball*, 65 Iowa, 543, * * *. *Miller* v. *Kirby*, 73 Ill. 242; * * *. While such malice in fact is essential to an award of exemplary damages, it may be proved directly or indirectly, that is to say by direct evidence of the evil motive and intent, or by legitimate inferences to be drawn from other facts and circumstances in evidence.
* * * * *."

(*Ibid.*, at pp. 161, 162, 163.) (Emphasis added.)

The matter herein was tried upon the premise respondent is a "public figure" and there was employed in establishing the liability of appellant the *New York Times* standard, expressed in the trial court's instruction to the jury that:

"In addition, plaintiff must prove by clear and convincing evidence that defendant published the item complained of with actual malice—that is, that the defendant published the item either knowing that it was false or with reckless disregard for whether it was true or false."

On the question of punitive damages, however, the jury was instructed that such damages could be imposed if appellant had been shown "by a preponderance of the evidence" to have been "guilty of malice," which was defined as:

"conduct which is intended by the defendant to cause injury to the plaintiff or carried on by the defendant with a conscious disregard for the rights of others."

Appellant asserts this instruction constituted prejudicial error in that, even apart from Civil Code section 48a, the law under the circumstances present requires that punitive damages may not be awarded to a public figure without proof of the publisher's hatred or ill will by clear and convincing evidence. Stated another way, appellant maintains that a "standard" of proof expressed in the trial court's "intended-conscious disregard" language, and a "burden" of proof based on a preponderance of the evidence, are inadequate in any libel case of the type present here. Support for the proposition, in appellant's view, is found in *Gertz* v. *Welch*, *supra*, 418 U.S. 323 and from the other cases similar to it which are cited above.

We are of the opinion that in so contending appellant is mistaken. As can be ascertained from what we have set out above, the "actual malice" required by *New York Times* to be established by "clear and convincing evidence" refers to that aspect of malice, properly denominated malice in law, necessary to find liability for libel and not to malice in fact, essential to the recovery of punitive damages, which under the cases discussed may be arrived at on the basis of applicable state standards, here on the basis of a preponderance of the evidence. (See *Cantrell* v. *Forest City Pub. Co.* (1974) 419 U.S. 245, 251-252; cf. *Smith* v. *Wade* (1983) —— U.S. ——, 75 L.Ed.2d 632.[8].) Moreover, as also appears from

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[8] "[Appellant] argues that the deterrent and punitive purposes of punitive damages are served only if the threshold for punitive damages is higher in every case than the underlying standard for liability in the first instance. * * *

"The argument overlooks a key feature of punitive damages—that they are never awarded as of right, no matter how egregious the defendant's conduct. * * *

"There has never been any general common-law rule that the threshold for punitive damages must always be higher than that

what we have said, the definition of malice in fact is not controlled by *New York Times* or its progeny, but is instead that articulated in *Davis* v. *Hearst*, namely, "the motive and willingness to vex, harass, annoy, or injure" or the "*malus animus*—indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though they may be wholly unconnected with any uncharitable feeling towards anybody.' " (*Davis* v. *Hearst*, *supra*, 160 Cal. 143, at pp. 152, 164, *Ibid.*, at pp. 162, 164, quoting from *Hicks* v. *Faulkner*, 8 Q.B. Div. 167), a standard which we think was adequately conveyed by the trial court's instruction.[9]

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for compensatory liability." (*Smith* v. *Wade*, *supra*, (1983) —— U.S. ——, 75 L.Ed.2d 632 at pp. 648-649.)

In the matter before us, of course, the "threshold" for punitive damages may be viewed as dependent both upon the substantive finding of conscious, as opposed to reckless, disregard, and upon the degree of proof—preponderance versus clear and convincing—necessary to support the finding. Whether conscious disregard found from a preponderance of evidence constitutes a *higher* threshold than reckless disregard found from clear and convincing evidence, we are satisfied the two are sufficiently similar that the application of the former, even in a context involving First Amendment issues, was justified.

[9] In *Taylor* v. *Superior Court* (1979) 24 Cal.3d 890, a case involving punitive damages in a personal injury action brought against an intoxicated driver it was recited that:

"Section 3294 of the Civil Code authorizes the recovery of punitive damages in noncontract cases 'where the defendant has been guilty of oppression, fraud, or malice, express or implied. . . .' As we recently explained, 'This has long been interpreted to mean that malice in fact, as opposed to malice implied by law, is required. [Citations.] The malice in fact, referred to . . . as animus malus, may be proved under section 3294 either expressly (by direct evidence probative on the existence of hatred or ill will) or by implication (by indirect evidence from which the jury may draw inferences). [Citation.]' (*Bertero* v. *National General Corp.* (1974) 13 Cal.3d 43, 66 * * *.)

"Other authorities have amplified the foregoing principle. Thus it has been held that the 'malice' required by section 3294 'implies

It is next contended, however, that regardless of what we have just said, the punitive damages assessed herein are still legally unsupportable. More specifically it is urged (a) the amount of those damages was grossly excessive; (b) such damages were impermissibly disproportionate to the compensatory damages awarded; (c) that the trial court erred in revising the ratio between punitive and compensatory damages on its remittitur; and

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an act conceived in a spirit of mischief or with criminal indifference towards the obligations owed to others.' (*Ebaugh* v. *Rabkin* (1972) 22 Cal.App.3d 891, 894 * * *; see *Gombos* v. *Ashe* (1958) 158 Cal. App.2d 517, 527 * * *; Stein, Damages and Recovery (1972) Nominal and Punitive Damages, § 186, at p. 369; Prosser, Law of Torts (4th ed. 1971) § 2, at pp. 9-10.) In Dean Prosser's words: 'Where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, all but a few courts have permitted the jury to award in the tort action "punitive" or "exemplary" damages. . . . [¶]Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent evil motive on the part of the defendant, *or such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton.*' (*Ibid.*, fns. omitted, italics added.)

"Defendant's successful demurrer to the complaint herein was based upon plaintiff's failure to allege any actual intent of defendant to harm plaintiff or others. Is this an essential element of a claim for punitive damages? As indicated by Dean Prosser, courts have not limited the availability of punitive damages to cases in which such an intent has been shown. As we ourselves have recently observed, in order to justify the imposition of punitive damages the defendant '". . . must act with the intent to vex, injure, or annoy, *or with a conscious disregard of the plaintiff's rights.* [*Citations.*]"' (Italics added; *Neal* v. *Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 922 * * *, quoting from *Silberg* v. *California Life Ins. Co.* (1977) 11 Cal.3d 452, 462 * * *; accord, *Seimon* v. *Southern Pac. Transportation Co.* (1977) 67 Cal.App.3d 600, 607 * * *; *G. D. Searle & Co.* v. *Superior Court* (1975) 49 Cal.App.3d 22 * * *.)" (*Id.*, at pp. 894-895; see also *Cantrell* v. *Forest City Pub. Co.*, *supra*, 419 U.S. 245, 251-252; cf. *Roemer* v. *Retail Credit Co.* (1975) 44 Cal.App.3d 926; *Field Research Corp.* v. *Patrick* (1973) 80 Cal. App.3d 603.)

(d) that insufficient evidence was present which would show appellant ratified the acts of its employees, so as to justify its liability for punitive damages under Civil Code section 3294(b).[10]

In addressing the claims that the penalty award was excessive and disproportionate, we accept as reiterative of settled principles those observations related in *Neal* v. *Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 927-928 (fns. omitted) to the effect that:

> "As we pointed out in *Bertero* v. *National General Corp.*, *supra*, 13 Cal.3d 43, our review of punitive damage awards rendered at the trial level is guided by the 'historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice . . .' (13 Cal.3d at p. 65, fn. 12.) Stating the matter somewhat differently in a similar case, we indicated that an appellate court may reverse such an award 'only "'[w]hen the award as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice.'"' (*Schroeder* v. *Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919 * * *.)
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> "In making the indicated assessment we are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular

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[10] **The statute provides in pertinent part that:**

**"An employer shall not be liable for [punitive] damages . . . based upon acts of an employee of the employer, unless the employer * * * ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the * * * ratification, or act of oppression, fraud, or malice might be on the part of an officer, director, or managing agent of the corporation."**

nature of defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. See *Bertero* v. *National Ins. Corp., supra,* 13 Cal.3d 43; 65; *Fletcher* v. *Western National Life Ins. Co., supra,* 10 Cal.App.3d 376, 408-509; *Ferraro* v. *Pacific Fin. Corp.* (1970) 8 Cal.App.3d 339, 352-353 * * *.) Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. (But cf. *Finney* v. *Lockhart* (1950) 35 Cal.2d 161, 164 * * *.) Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence * * * will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. See *Bertero, supra,* at p. 65; *Roemer* v. *Retail Credit Co.* (1975) 44 Cal.App.3d 926, 937 * * *; *Wetherbee* v. *United Ins. Co. of America* (1971) 18 Cal.App.3d 266, 270-271 * * *; *Ferraro* v. *Pacific Fin. Corp., supra,* 8 Cal.App.3d 339, 353; *MacDonald* v. *Joslyn* (1969) 275 Cal.App. 2d 282, 293-294 * * *.) By the same token, of course, the function of punitive damages is not served by an award which in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (See also *Roemer* v. *Retail Credit Co., supra,* 44 Cal.App.3d 926, 937; *Wetherbee* v. *United Ins. Co. of America* (1971) 18 Cal.App.3d 266, 271.)

We likewise accept the proposition it is our duty to intervene in instances where punitive damages are so palpably excessive or grossly disproportionate as to raise a presumption they resulted from passion or prejudice. (See *Rosener* v. *Sears, Roebuck & Co.* (1980) 110 Cal.

App.3d 740, 749-750; *Zhadan* v. *Downtown L.A. Motors* (1976) 66 Cal.App.3d 481, 496.)

Viewing the record in the light of these principles, and assuming, as we will hereinafter decide, that the award of compensatory damages was proper, we are of the opinion the award to respondent of $750,000 in order to punish and deter appellant was not justified.

In so concluding, we are persuaded the evidence fairly showed that while appellant's representatives knew that part of the publication complained of was probably false and that the remainder of it in substance might very well be, it was nevertheless determined to present to a vast national audience in printed form statements which in their precise import and clear implication were defamatory, thereby exposing respondent to contempt, ridicule and obloquy and tending to injure her in her occupation. We are also satisfied that even when it was thought necessary to alleviate the wrong resulting from the false statements it had placed before the public, the retraction proffered was evasive, incomplete and by any standard, legally insufficient.[11] (See *Turner* v. *Hearst* (1896) 115 Cal. 394, 402-403; *Behrendt* v. *Times-Mirror* (1938) 30 Cal.App.2d 77, 88.) In other words, we have no doubt

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[11] The retraction appeared as the eighth item of a ten-item gossip column, whereas the libelous item was contained as the fourth item. The headline to the gossip column containing the retraction failed to make any reference to the retraction although the defamatory item was highlighted by a large headline at the top of the column. Even though the original defamatory item was further emphasized by its placement adjacent to a picture of Barbara Walters, the retraction was not placed next to a picture of a prominent celebrity. The purported retraction was also substantially shorter and occupied less column space than the original item. It repeated the substance of some of the defamatory statements while failing to refer to others. Most notably, it never stated that Carol Burnett was not inebriated. By inference it suggested that only the few published statements were false while the rest must have been true. It equivocated by ambiguously stating "we understand" that the events did not occur.

the conduct of appellant respecting the libel was reprehensible and was undertaken with the kind of improper motive which supports the imposition of puntive damages.

Nevertheless, evidence on the point of appellant's wealth adequately established appellant's net worth to be some $2.6 million and its net income for the period under consideration to be about $1.56 million, such that the penalty award, even when substantially reduced by the trial court based on its conclusion the jury's compensatory verdict was "clearly excessive and * * * not supported by substantial evidence," continued to constitute about 35% of the former and nearly half the latter.

Such being the case, and in the effort required of us to find acceptable only that balance between the gravity of a defendant's illegal act and a penalty necessary to properly punish and deter such unlawful conduct as will serve the function of punitive damages, we hold the exemplary award herein to be excessive, and require either that it be reduced to the sum of $150,000 or that appellant be granted a new trial on that issue. (See *Rosener* v. *Sears, Roebuck & Co., supra*, 110 Cal.App.3d 740, 757.)

Having so decided, it is unnecessary for us to address appellant's further contention the trial court was bound on its remittitur, at least as to an upper limit of punitive damages, to the ratio of damages established by the jury.[12]

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[12] We are sensitive to the fact that all facets of defamation law since the *New York Times* case have been under the rigid scrutiny of the Supreme Court of the United States for the purpose of reconciling the common law and/or state law of defamation with the guarantees of the First Amendment.

In effecting that reconciliation, the high court has announced significant changes with respect to the rule of liability and the need of clear and convincing evidence to establish liability. It has announced too substantial restrictions respecting the recovery of

We also summarily reject the claim the malice in fact established herein should not have been attributed to appellant, since it is clear to us from the record the acts of the individuals involved in publishing the defamatory statements were ratified in accordance with the requirements of Civil Code section 3294(b). (See fn. 10.)

*Was there error associated with the award to respondent of $50,000 in compensatory damages? No.*

We have previously recited those considerations, both legal and factual, which underlie our conclusion appellant's liability herein was established upon clear and convincing evidence. It remained nevertheless for respondent to establish the actual damage she had suffered as a result of the publication involved. Whether such damage necessarily encompassed both special and general damages was a matter dependent upon whether the publication was or was not libelous on its face, in accordance with Civil Code section 45a which provides that:

> "A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code."

That what was printed here was libelous on its face seems abundantly clear, in that the message conveyed

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damages where the *New York Times* standard for liability is not adhered to. (See *Gertz* v. *Welch, supra*, 418 U.S. 323, 349-350.) But while a review of the decisions of that court on the subject reveals a wide spectrum of opinion concerning the propriety of punitive damages in instances like the one before us, we do not find in any of these authorities an announcement of definitive principles which a state must apply to awards of such damages when, as here, the *New York Times* test has been satisfied. We have therefore applied the law of this state on that question, as we perceive it to be.

was that respondent had been boisterous and loudly argumentative in a public dining place, had "traipsed" around the restaurant sharing part of her dinner indiscriminately, and had "raised eyebrows" when she boorishly giggled instead of apologizing after spilling wine on another, a message which reasonably carried the implication respondent's actions were the result of some objectionable state of inebriation. Nor is the character of the publication altered by the consideration it might have been interpreted innocently.

> "The fact that an implied defamatory charge or insinuation leaves room for an innocent interpretation as well does not establish that the defamatory meaning does not appear from the language itself. The language used may give rise to conflicting inferences as to the meaning intended, but when it is addressed to the public at large, it is reasonable to assume that at least some of the readers will take it in its defamatory sense. * * * It would be a reproach to the law to hold that a defendant intent on destroying * * * reputation * * * could achieve his purpose without liability by casting his defamatory language in the form of an insinuation that left room for an unintended innocent meaning."
>
> (*MacLeod* v. *Tribune Publishing Co.* (1959) 52 Cal. 2d 536, 549, 551; *Fairfield* v. *Hagan* (1967) 248 Cal.App.2d 194, 200-201.)

Accordingly, it was incumbent upon respondent to show only those general damages caused by appellant's wrong, *i.e.*, damages arising from respondent's loss of reputation, shame, mortification and injured feelings. In this regard her own testimony was to the following effect:

> "Q When was the first time that you had any knowledge of that article or the contents of that article?
>
> "A I believe it was the day that it came out.
>
> * * * *

"Q What was your reaction?

"A Well, I was absolutely—I was stunned.

* * * *

I felt very, very angry. I started to cry. I started to shake.

"Q Why such a reaction to this [article]?

"A Well, it portrays me as being drunk. It portrays me as being rude. It portrays me as being uncaring. It portrays me as being physically abusive.

It is disgusting, and it is a pack of lies.

I—It hurts. It hurts, because words, once they are printed, they've got a life of their own. Words, once spoken, have a life of their own.

How was I going to explain this to my kids, my family, the people I care about?

How am I going to go talk to do things * * * against alcoholism?

* * * *

"Q [Y]ou mentioned something about work against alcoholism.

What is that?

"A It didn't start out as any kind of a crusade at all. I think I must have spoken about it many years ago, first maybe in a magazine article for McCall's or Redbook or Ladies' Home Journal, or something like that, when, in a sense, I came out of the closet about my parents.

I told about my background.

* * * *

Then I was asked about it on a few talk shows, and then I started getting requests to do various public service things relating to abuse of alcohol, which I was very happy to do.

"Q And you have done a number of public service things—

"A. Yes.

"Q —relating to abuse of alcohol?

"A Yes.

"Q Now, when you first heard about this article, when you first heard what the article said, I take it, from what you said, that you at least interpreted the language of the article as inferring that you were intoxicated?

"A I think anyone who can read would.

"Q And your reaction—one of the reactions you had—we are not talking about now, but at the time you heard about this article, one of the reactions you had was, as you described it, related to this work that you had been doing, the—let's say image, for lack of a better word, the image that you have in respect to the working against abuse of alcohol?

"A Yes. I mean, it hurts. If you think you are going to get up there and talk to somebody and say, 'Hey, you know, there is a way, there is a cure for this, and people have been cured—' If I get up and talk about that and somebody having read that or heard about it says, 'Who is she to get up there and tell me what to do, she runs around having fights with people and throws wine on them,' I mean, what—You see what I'm getting at?

I tell you what really hurts is that I know—I really know that most people believe what they read. And that hurts.

"Q What did you—And I preface this by saying, and obviously you know it already, that we have to describe the feelings that you had, both physical and mental, at the time you found out about this article. What did you feel physically, if anything different than usual?

"A Well, I don't think I would be different from anybody else, if anyone in here just put their name on that. Some people might get a headache. My stomach just went back and forth, and did flip flops. My stomach did flip flops. I cried. When you cry

and your stomach does that, your heart pounds real fast. You shake, You cry. You calm down, you cry; you calm down, then you start thinking about all the ramifications, about, 'Oh, my God, should I call my kids? Are they going to hear about this in school or should I talk to them about it and say, 'Hey, it didn't happen'? Should I call my relatives? What should I do? Should I ignore anything that anybody is going to say to me today? But what am I going to do tomorrow?'

• • • •

"Q Was the article that had been read to you still on your mind as you were walking to rehearsal?

"A Yes.

"Q Did anything unusual happen to you during the time you were walking?

"A I was crossing the street and a cab driver yelled out at me and said, 'Hey, Carol, I didn't know you like to get into fights.'

"Q This, apparently, obviously, was a person that you did not know?

"A No. It was a cab driver .

• • • •

"Q Does this article still concern you?

"A Yes.

"Q Why is that?

• • • •

"[A]

When I am dead and gone, it's going to be in my files.

My kids, my grandchildren, great-grandchildren, whatever—everybody's got a file on people, library, if you will—they can look that up.

And unless—it's always going to be with me."

The foregoing, in our view, when combined with the further evidence of respondent's prominence in the public eye, her professional standing and the fact the National

Enquirer is read by some 16 million persons, was sufficient to support an award of $50,000 in compensatory damages.[13] (See *Scott* v. *Times-Mirror Co.* (1919) 181 Cal. 345, 365; *Douglas* v. *Janis* (1974) 43 Cal.App.3d 931, 940; see also *Allard* v. *Church of Scientology* (1976) 58 Cal.App.3d 439, 450.)

*Was there any other reversible error present in the matter? No.*

Finally it is maintained the trial court committed prejudicial error in its rulings respecting two incidents which occurred during the course of the trial.

In the first of these, as an accommodation to respondent's lawyer, counsel for appellant, in the presence of the jury, read aloud the following from deposition testimony.

> "Q Do you have any agreement at this time with the National Enquirer as to any possible liability that you may have concerning this article, such as an indemnification agreement?
>
> "A Yes, obliquely, I have been told.
>
> "I believe, although I do not specifically remember, although I think I specifically remember Iain Calder, the editor and chief of the National Enquirer, told me that I would be in no way held personally reliable [sic] and that we have insurance.
>
> * * * *
>
> "And to this day everything that is written in the column is covered—"

There then transpired the following exchange between the trial court and counsel for the parties.

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[13] It is also urged by appellant it was improper for the trial court to instruct the jury it could consider respondent's particular susceptibilities and circumstances in arriving at actual damages. If there were error in that respect, we deem it harmless in light of the evidence adduced on the issue. (Cal. Const., Art. VI, § 13.)

"[COUNSEL FOR APPELLANT:] I have to move for a mistrial on behalf of all of my clients. There has been a reference to insurance. The incredibly embarrassing thing for me professionally and ethically is that I was the instrumentality, if you will, of exposing this.

"THE COURT: Well, unfortunately, you know, I guess all of us—this can happen to all of us.

* * * *

"And I can give—I'm going to deny the motion for a mistrial, but I'm going to—If you want, I can give an admonition that I think is contained in BAJI 1.04, or whatever the appropriate number is. I'd be happy to do that.

"Sometimes that calls undue attention to it. Whatever your pleasure is. I can cover it that way.

* * * *

"So why don't we just have a stipulation that there was no insurance or something like that.

"[COUNSEL FOR APPELLANT:] Well, I'm sure not trying to be difficult, because I'd love to have this done. * * *

"COUNSEL FOR RESPONDENT:] How about just telling them that they should ignore the last comment?

" 'There is no insurance applicable to this case.' "

"[COUNSEL FOR APPELLANT:] Well, I'd sure like to tell them for their purposes there is no insurance that is applicable to this case; that the witness as in error.

"THE COURT: Fine."

The trial court then advised the jury what they had heard was erroneous and that there "was no insurance in the case."

We find no error in this of which appellant may complain. Having joined in fashioning the corrective admonition, it cannot now be heard to say the cure was worse than the disease (Cf. *Weirum* v. *RKO General,*

*Inc.* (1975) 15 Cal.3d 40, 50), and had nothing further been said to the triers of fact, the disclosure described would not have warranted a mistrial. (See *Packard* v. *Moore* (1937) 9 Cal. 2d 571, 580.)

In the second incident referred to, at least a number of the jurors became aware of a verbal denunciation of the National Enquirer by television star Johnny Carson on his program, "The Tonight Show," wherein he asserted essentially that the publication was composed of fabrications authored by liars. After examining each juror concerning the effect of the tirade on the juror's ability to participate in a fair and impartial trial and being satisfied in the premises, the trial court excused two of the triers of fact, seated the only available alternate, and proceeded with a panel of eleven, from which it was agreed nine could determine the cause. No more was required. (See *People* v. *Manson* (1977) 71 Cal. App.3d 1, 28; *People* v. *Byers* (1970) 10 Cal.App.3d 410, 416; *People* v. *Blackwell* (1967) 257 Cal.App.2d 313, 321-323.)

The judgment is affirmed except that the punitive damage award herein is vacated and the matter is remanded for a new trial on that issue only, provided that if respondent shall, within 30 days from the date of our remittitur, file with the clerk of this court and serve upon appellant written consent to a reduction of the punitive damage award to the sum of $150,000, the judgment will be modified to award respondent punitive damages in that amount, and as so modified affirmed in its entirety. (*Rosener* v. *Sears Roebuck & Co.*, *supra*, 110 Cal.App.3d 740, 757.) Each party to bear her or its costs on appeal.

CERTIFIED FOR PUBLICATION.

Roth
_____, P. J.
ROTH

I concur:
Gates
_____, J.
GATES

## CONCURRING AND DISSENTING OPINION

I concur in the affirmance of the judgment, but I dissent from that part of the majority opinion reducing the award of punitive damages.

Our decision in *Allard* v. *Church of Scientology* (1976) 58 Cal.App.3d 439 fully supports the majority view herein. But I am now convinced it was a mistake in *Allard* to have uncritically applied the rule and majority view of *Cunningham* v. *Simpson* (1969) 1 Cal.3d 301, thus resulting in a reduction of the punitive damages in *Allard*. Unlike Dr. Frankenstein, we did not create a "monster." Nonetheless by our *Allard* decision we helped nurture an improper and growing practice in the appellate courts to reduce punitive damages simply because of some sort of "disproportion." While consistent with established case law, I believe the practice needs limiting if it is not in fact error.

The weakness in *Allard* and in the present majority opinion is its undue weight and emphasis on the presumption that just because an award of punitive damages is a certain percentage greater than actual damage it must have been a result of passion and prejudice. I think such presumption is a non sequitur. In each case it is just as probable that the verdict was the result of fair, honest, cool and dispassionate deliberations of the jury concluding that it would take at least that much money to teach the defendant a lesson and to insure that it will not offend again.

In reducing a jury's award of punitive damages, the court is in effect reweighing the evidence, which is a function of the jury and should be interfered with only upon a clear and convincing showing that the jury was driven by passion and prejudice. Interference with the jury's award should not rest upon indulging in a presumption based merely on comparing punitive and compensatory damages nor merely upon an award which to the appellate court's mind is "too much." As Justice Mosk stated

in his dissent in *Cunningham* v. *Simpson*, *supra*, 1 Cal. 3d 301, 311-312: "Part of the damages awarded here were punitive. Again, the law on this subject is clear. '[The jury's estimate] of what would be sufficient as a punishment and a deterrent and an example was very high as compared with the actual damages assessed and high from any point of view, but it would hardly be candid to invite them . . . to fix such sum which expressed their judgment in such matter, and then charge them with bias or perversity because the measure of their abhorrence of defendant's conduct and their judgment of what would be a sufficient punishment and deterrent was represented by a larger sum of money than that which some other man or men would have allowed.' (*Di Giorgio Fruit Corp.* v. *AFL-CIO* (1963) *supra*, 215 Cal.App.2d 560, 581, quoting *Scott* v. *Times-Mirror Co.* (1919) 181 Cal. 345, 367 [184 P. 672, 12 A.L.R. 1007].)"

Admittedly, some of the foregoing considerations apply equally to an award made or resulting from a reduction by a trial judge alone as well as to an award made by a jury. But it must be remembered that our inquiry at bench is not into the motives of the jury. Rather, our inquiry is whether the trial court erred in reducing the amount of punitive damages from that which the jury had fixed. The act of the trial court appears to have been an attempt to be moderate. Reducing an award of punitive damages from $1,300,000 to $750,000 does not seem to me to be an act of passion or prejudice. In the absence of a showing by appellant that the reduction was the result of bias by the trial court, its determination must be upheld on appeal.

In assessing the correct amount of punitive damages, of equal importance as the majority's view of proportionality based on comparison of compensatory damages are the facts considered and expressly relied on by the trial court at bench in reducing and fixing the amount of punitive damages in denying the motion for new

trial. Among these are: "[t]he conduct of the defendant was highly reprehensible, . . . [was a] fabrication and reckless disregard; . . . [f]ailure by top management to publish an adequate correction is substantial evidence of malice and bad faith; . . . defendant's net worth amounted to approximately $2,600,000 and it had earnings of $1,300,000 after taxes for the last ten month period; . . . the defendant has absolutely no remorse for its misdeeds; . . . it is the policy of the National Enquirer to publish two or three unflattering articles about celebrities every week; . . . [t]he defendant engages in a form of legalized pandering designed to appeal to the readers' morbid sense of curiousity[;] [t]his style of journalism has been enormously profitable to the defendant; . . . [a]n award of $1,300,000 will probably not amount to 'capital punishment' (bankruptcy), . . . because of the defendant's strong cash position."

The fact is that this is a publication read nationally by 16 million people. The potential for harm through a repetition of a libel by such an institution is tremendous. There are others to be protected from the harm. If the risk to an intentional wrongdoer that he will be adequately punished is slight, the defendant may well chance it again. It can in effect "write it off" as an expense or cost of doing business. Thus punitive damages need to be more than "an expense" item or "cost of doing business' which the defendant can calculate and absorb. In a case such as this, reference to the ratio of compensatory to punitive damages, such as emphasized in the majority opinion, is neither helpful nor relevant. (*Vossler* v. *Richards Mfg. Co.* —— Cal.App.3d —— (5 Civ. 6436, filed June 15, 1983.) Perhaps some cases lend themselves to comparison of various ratios. I think most do not. Ratio examination of the amount of compensatory damage to amount of punitive damage does not really tell us what is necessary to teach a defendant, such as the one at bench, not to abuse its privileges of the freedom of the press. On the other hand, considerations of punitive

damage to defendant's wealth may be more germane. As stated in *Neal* v. *Farmers Ins. Exchange* (1978) 21 Cal. 3d 910, 928: "[A]lso to be considered is the wealth of the particular defendant; obviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." Yet to reduce the award from $750,000 to $150,00, as suggested by the majority in this case would do just that.

I would affirm the trial judge's determination of the proper amount of punitive damages.

/s/ Beach, J.
BEACH

*CERTIFIED FOR PUBLICATION*

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

---

2d Civ. No. 66447

(Sup.Crt. No. C157213)

---

CAROL BURNETT,
*Plaintiff and Respondent,*

v.

NATIONAL ENQUIRER, INC.,
*Defendant and Appellant.*

---

[Filed Aug. 1, 1983]

MODIFICATION OF OPINION

THE COURT:

It is ordered that the opinion filed herein on July 18, 1983, be modified in the following particular:

The citation to Restatement, Torts (2d) § 642D, comment g (1977) which appears at the end of footnote 6 on page 21 of the opinion will be deleted, so that footnote 6 will terminate with the reference "(N.D. Calif. 1971)."

CLERK'S OFFICE
COURT OF APPEAL
SECOND DISTRICT

---

3580 WILSHIRE BOULEVARD
SUITE 301
LOS ANGELES, CA 90010

---

*Los Angeles, Cal.*
AUG. 11 1983

*No.* 66447

CAROL BURNETT

VS.

NATIONAL ENQUIRER

THE COURT: Petition for rehearing denied. (appellant)

---

CLAY ROBBINS,
*Clerk*

CLERK'S OFFICE
COURT OF APPEAL
SECOND DISTRICT

---

3580 WILSHIRE BOULEVARD
SUITE 301
LOS ANGELES, CA 90010

---

*Los Angeles, Cal.*
AUG. 11 1983

*No.* 66447

CAROL BURNETT

vs.

NATIONAL ENQUIRER

THE COURT: Petition for rehearing denied. (respondent) (I would grant, Beach, J.)

---

CLAY ROBBINS,
*Clerk*

CLERK'S OFFICE
COURT OF APPEAL
SECOND DISTRICT

---

3580 WILSHIRE BOULEVARD
SUITE 301
LOS ANGELES, CA 90010

---

*Los Angeles, Cal.*
OCT 17 1983

*No.* 66447

BURNETT

VS.

NAT'L ENQUIRER INC.

REMITTITUR ISSUED

---

CLAY ROBBINS,
*Clerk*

## APPENDIX B

**Order of the Supreme Court of California Denying Hearing**

---

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 2, Civil No. 66447

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

---

SUPREME COURT,
FILED
OCT 6 1983
LAURENCE P. GILL, Clerk
Deputy

BURNETT

v.

NATIONAL ENQUIRER, INC.

---

Petitions of appellant and respondent DENIED.

Bird, C.J., is of the opinion that Plaintiff Burnett's petition should be granted.

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BIRD, C. J.
*Chief Justice*

## APPENDIX C

**Opinion of the Superior Court for the County of Los Angeles, March 18, 1981**

---

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 36

HON. PETER S. SMITH, JUDGE

---

No. C 157213

CAROL BURNETT,
*Plaintiff,*

vs.

NATIONAL ENQUIRER, INC., *et al.*,
*Defendants.*

* * * *

[1018] THE COURT: All right. Mr. Masterson, I realize that the plaintiff goes first in the argument, but I want to try to bring this to some conclusion here, and I think both of you have made an excellent record and we have more than enough evidence.

The court has read last night, until my eyes drooped, a lot of copy. But I would like you to focus on this one thing.

We don't deal, in most cases, in absolutes in life, we deal with a lot of things that are hybrid, and there probably isn't anything spelled out in terms of standards how to weigh these things. There isn't anything spelled out in the statute. Unfortunately, the cases don't

spell it out. There are a few hints there but—I will let you address this.

The predominant appeal, from what I can tell of reading the four editions of the National Enquirer that I mentioned before, is not the timely news. It just falls flat on its face. And if you can point out where I'm incorrect—[1019] I have found—There were some instances in there, for example, the Howard Hughes story, that might arguably—it was about a month old at the time.

I'm not saying the paper is totally devoid of it, but I really challenge you to tell me where, in those editions, really this timely news predominates, because I can't find it.

That to me is the critical thing in deciding whether this is a newspaper or a magazine.

There are a lot of other things I can talk about, but that is what it's really all about.

MR. MASTERSON: Okay. If I may address the court.

THE COURT: Sure.

MR. MASTERSON: My concern is, given the court's introductory remarks, that it is laboring under a misapprehension. The concept is almost facile that news must be current or fast-breaking to be news. It is a dangerous concept, I think, for the court to even attempt to embrace, because not only does it not conform with the reality of American publishing and journalism but it would render almost impossible the application of a section 48(a) case by the court.

Your Honor, I have heard it said that news is what an editor says it is. There may be some of the Fourth Estate that would agree with me on that. Maybe some would disagree. But, essentially, news is what somebody doesn't know already. That is really what news is.

And some person may pick up a paper and say, "Well, I know all that. I saw it on television." The electronic media has practically obliterated the afternoon newspapers, [1020] for all intents and purposes.

What happens, Your Honor, is that stories are researched, and stories are prepared, and stories are published. Now, what is published in the Enquirer is news to the Enquirer readers.

Now, clearly they have a type of readership that could be a different type of readership than your local metropolitan daily, but I submit that is a distinction without a difference because that which is published in the Enquirer is news to the people who buy it.

Now, for any court, in determining whether protection is going to be given to a newspaper on some sort of a test as to whether we have current or fast-breaking news, I think is just an almost frightening thing.

THE COURT: Well, not really. Because you have to go and examine the rationale behind Civil Code Section 48(a), and it deals—the whole idea behind it is that certain types of news media, and namely the newspaper, the radio and television, deal with fast-breaking news. That is the predominant thing that they deal with.

Let me give you an example, and I don't want to single out a station, and I can't really remember who it was. But sometime in the last year, when these police shootings were big news, on the 11 o'clock news one night one of the channels went out there and covered a story, and, I think, did it in sort of a haphazard fashion, but they didn't have time to thoroughly check that thing out. They couldn't shelve it and hopefully by 6:00 the next evening they—I think they did [1021] rectify some of the problems. And that is why we have the retraction statute. [1022] I just don't see your client has presented anything that really entitles it to any of the benefits.

And that's where it's really at.

I mean, I can't totally ignore the fact that it's called itself a magazine.

I can join the County Bar Association, but if I ever get practicing law, I'm in deep trouble, you know. I mean, I can join a lot of organizations.

So that really isn't significant.

And I'm sure that they can switch their classification to newspaper in the audit bureau willy-nilly to suit their purposes.

But, I mean, I am taking that into consideration.

But I'm really talking about the policy considerations behind the statute. I just don't think that your client qualifies for them.

I'm sorry. I don't think it's even close.

I'm not suggesting that there is a 65 percent test or a 75 percent test.

And unfortunately, none of the cases, and I doubt if they ever will, spell them out; but I hope somewhere along the line they will get into talking about some of the significant factors that you weigh.

And, of course, there is another thing that could make this whole discussion largely academic, and I don't want to prejudge it because there is one fact I don't have filed before me in a stipulation with the court, but there is a very high probability that your client did not comply with the [1023] retraction statute in a timely manner period because of the time lapse.

And they didn't get the thing in by—I'm running the 21 days from the 4th if April, and I can't be absolutely positive of that because I don't have before me when your client received the letter not the telegram—and I think that should be clarified before the trial is over—but it may ultimately make no difference how I rule. It may very well, I don't know.

But I don't think it's close factually. I really don't.

I mean, I don't have any problem distinguishing the New York Daily News from the National Enquirer.

Sure, they are both in tabloid forms, but that goes to form and not substance.

And that's what counts.

MR. MASTERSON: Well, Your Honor, I guess I just—

Here's the concern I have, and I want to speak as respectfully but yet as sincerely and as earnestly as I can.

THE COURT: I am sure you are.

MR. MASTERSON: I personally have grave concern as a lawyer representing a media defendant when any court starts inquiring as to the content of a newspaper.

I don't want to go beyond the confines of this case, Your Honor, but what I'm suggesting is I would hate to see any court proceed to make judgments as to, you know, what is current, what is not current.

[1024] What I am advocating is a test simple to apply, one that I think doesn't really do violence to either the philosophy or the spirit of section 48(a).

In Government Code it says that we can have such a thing as a weekly newspaper.

A weekly newspaper wouldn't fit somebody else's definition, Your Honor, of current news.

And so I suggest that what the court should do would be that if it calls itself a newspaper, if it looks like a newspaper, then it's a newspaper.

The problem is that if the court gets in there and starts saying, "Well, that's not adequate, that's not timely," what about some of the local weekly newspapers?

I just think that the court's indicated decision—I don't understand that the court has ruled as yet—could really wreak havoc with the publishing industry in California.

THE COURT: Well——

MR. MASTERSON: Frankly, Your Honor, if we haven't published in time, I would prefer the court to rule on that matter rather than to tread into——

THE COURT: Well, I can't say that it is going to be that momentous, because in Montandon v. Triangle Publications at 45 Cal.App.3d 938, TV Guide was ruled to be a magazine by the court in that case and the earth, you know, still turns.

I don't think it's had a chilling effect, as some people say, on the dissemination of news.

Unfortunately, they didn't really go into the details other than the fact that someone from that publication [1025] was called and testified that they were a magazine, as I recall.

MR. MASTERSON: They call themselves a magazine, Your Honor.

[1026] THE COURT: They call themselves a magazine.

But, you know, if I accept—

Well, let's talk about the government code for a second, because that, I think, we all know applies to standards that are set forth for publishing legal notices and that sort of thing.

And I'm confining myself to, I think, the definition in Black's Law Dictionary, which I can read just to—

What it says basically is this:

> "A publication—" this defines a newspaper, not a magazine—"A publication usually in short form intended for general circulation and published regularly a short intervals containing intelligence of current events and news of general interest."

And it doesn't define "magazine" in Black's Law Dictionary, unfortunately, but your client has testified, Mr. Calder has, that they compete for advertising revenue with the magazines.

There just is all sorts of substantial evidence.

I do not think it's close, and I'm sorry. Maybe when the dust settles, you can sort of stand back from this, because apparently I've caught you by surprise.

MR. MASTERSON: No, no, I tell you, I'm never surprised these days, Your Honor.

But I want to keep the court really from—I'm very, very concerned for not only my client, I'm concerned for [1027] the court.

I don't mean to act like a Greek bearing gifts. But for the court to make a determination such as this, which I submit is unnecessary to be made in this case, totally

unnecessary to be made in this case, we immediately have a court making determinations, rulings, based upon content of a paper.

And the court may have a perception as to what is current news.

THE COURT: Why is it unnecessary?

MR. MASTERSON: Well—

THE COURT: I'm sure there are going to be a lot of people that will be unhappy at 20 after 4:00 if it was all unnecessary that we were here today.

MR. MASTERSON: No, no, no, no. What I'm saying is for Your Honor to apply the test, that was unnecessary, because the court could have accepted the self description of the Enquirer, the physical appearance of the Enquirer, the recognition that it is in a long history of American journalism, tabloid journalism, Your Honor, featuring a number of features.

But to impose a limitation and an analysis based upon whether news is timely enough, this court's perception could be one way, some other court's perception could be another way.

Maybe we are a newspaper one week and maybe we are not.

That's why I say the court is undertaking for the courts vis-a-vis the printed media an unnecessary burden.

[1028] THE COURT: Well, I'm only undertaking it for this trial court. And obviously I can be reviewed and reversed and all that. And what I do here is not going to bind any other judge.

I'm sure you are well aware of that.

MR. MASTERSON: Yes, sir.

THE COURT: I think unless there is something more to add to it, I've pretty well made up my mind on it.

MR. MASTERSON: I understand. I appreciate the opportunity, Your Honor.

It is submitted as far as I'm concerned. Thank you.

THE COURT: All right, thank you, Mr. Masterson.

All right. I don't think it needs more elaboration, because essentially this is something that goes to determining what instructions will be given to the jury.

But at least for what it is worth I am ruling that the National Enquirer is a magazine for purposes of not giving them the benefit of Civil Code Section 48(a).

* * * *

## APPENDIX D

**Opinion of the Superior Court for the County of Los Angeles, May 13, 1981**

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SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

---

No. C 157 213

CAROL BURNETT,
*Plaintiff,*

vs.

NATIONAL ENQUIRER, INC., *et al.*,
*Defendants.*

[Filed May 13, 1981]

---

ORDER DENYING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT; ORDER DENYING MOTION FOR NEW TRIAL ON CONDITION PLAINTIFF ACCEPTS REDUCTION OF DAMAGES

MEMORANDUM OPINION, SPECIFICATION OF REASONS FOR REDUCING DAMAGES

It is not the intention of the court to deal at great length with every issue raised by defendant in its motion for judgment notwithstanding the verdict and motion for

new trial, but simply to articulate the reasons for denying defendant's motions, save and except the motion for new trial as it relates to the issue of damages.

Initially, defendant contends that its publication of March 2, 1976 about plaintiff was not libelous per se. It is clear to the court that the average reader, viewing the article in its entirety, would conclude that plaintiff was intoxicated and causing a disturbance. The evidence is undisputed that the article was false. There can be little question that the described conduct of plaintiff holds her up to riducule [*sic*] within the meaning of California Civil Code section 45.

The National Enquirer's protestation that it was not guilty of actual malice borders on absurdity. Not only did plaintiff establish actual malice by clear and convincing evidence, but she proved it beyond a reasonable doubt. At the very minimum Brian Walker, the de facto gossip columnist, had serious doubts as to the truth of the publication. There is a high degree of probability that Walker fabricated part of the publication—certainly that portion relating to plaintiff's row with Henry Kissinger.

Walker received information from Couri Hay, a free lance tipster for the National Enquirer, that Carol Burnett had been in the Rive Gauche restaurant, that she ordered a Grand Mariner [*sic*] souffle and that she passed her dessert to other parties in a boisterous or flamboyant manner; that she had been drinking, *but was not drunk.* Hay contends that this was verified through the maitre 'd. On the other hand, Hay related to Walker that he had received *unverified* information that Burnett had spilled wine on a customer and the customer had returned the favor by spilling water on her.

Shortly after receiving the information from Hay, Walker called Steve Tinney, the nominal gossip columnist, to see if he had any contacts in Washington who could verify Hay's tip. Walker expressed doubts to Tinney about Hay's trustworthiness. Tinney agreed with

Walker's assessment of Hay, but told him he had no contacts in Washington.

Next Walker asked Grey Lyon, defendant's employee, to verify the "incident at the Rive Gauche". Walker told Lyon he had a one hour deadline to meet even though the publication was not due to "hit the streets" for thirteen days.

Lyon was asked to verify the following information: That Carol Burnett had been in a Washington, D.C. restaurant, that she had some sort of interchange with other customers and that an altercation took place with another customer—to wit, "the wine spilling and water throwing incident".

Lyon reported to Walker that he had not been able to verify anything other than the fact that plaintiff had passed dessert to other patrons. Additionally, he told Walker a fact *not* previously disclosed to him by Hay—that Henry Kissinger and plaintiff had carried on a good-natured conversation at the Rive Gauche that same night.

Confronted with this disappointing revelation, Walker expressed concern to Lyon as to whether he should publish the article. He kept pushing Lyon for his opinion. Lyon became angry and told him that he (Walker) was being paid to make those decisions.

At this point, it is fair to infer that Walker decided that there was little news value in the fact that Burnett and Kissinger had a good-natured conversation and that Burnett distributed her dessert to other patrons. A little embellishment was needed to "spice up" the item.

An entire afternoon was devoted to the issue of whether the National Enquirer was a newspaper or magazine. The court reaffirms its finding that the defendant does not qualify for the protection of California Civil Code section 48a because, when Exhibits 21, 22, 174 and 175 are viewed as a whole, the predominant function of the publication is the conveying of news which is neither timely nor current. Additionally, the defendant has been

registered as a magazine with the Audit Bureau of Circulation since 1963, and carries a designation as a magazine or periodical in eight mass media directories.

In *Werner v. So. Calif. etc. Newspapers*, 35 Cal.2d 121, 128 (1950) our Supreme Court upheld the constitutionality of California Civil Code section 48a against an attack that it unfairly discriminated in favor of newspaper and radio stations. The court articulated its rationale as follows:

> "In view of the complex and far flung activities of the news services upon which newspapers and radio stations must largely rely and the necessity of publishing *news while it's new* (emphasis mine), newspapers and radio stations may in good faith publicize items that are untrue but whose falsity they have neither the time nor the opportunity to ascertain."

Since the defendant rarely deals with "news while it's new", it is not entitled to the protection of Civil Code section 48a.

Defendant has gone to great lengths to blame the adverse jury verdict on prejudicial trial publicity and, in particular, the blast by entertainer Johnny Carson. Some will question the sagacity of Carson's timing, but no one can question his constitutional right to air his grievance with defendant. While the defendant had the right to publish an article about Carson, it exercised incredibly poor judgment in publishing the article on the eve of the trial.

The National Enquirer successfully challenged two jurors who viewed or heard the Carson tirade. It did not see fit to challenge any others even though the trial could have proceeded with as few as eight jurors. Accordingly, defendant cannot now complain about three other jurors being tainted. The court questioned all jurors individually in chambers in the presence of counsel. Counsel were afforded an opportunity to question the jurors. The court denied the defendant's motion for a mistrial because it

was satisfied, without any reservation whatsoever, that the remaining eleven jurors could render a fair trial to defendant.

*DAMAGES*

Preliminary to the subject of general and punitive damages is the question of whether defendant published an adequate correction since that is an issue relating to the mitigation of damages. In the present case, two critical questions must be answered:

1) Was the correction published with prominence substantially equal to the statement claimed to be libelous?

2) Did the correction without uncertainty and ambiguity honestly and fully and fairly correct the statement claimed to be libelous?

The answer to both questions is in the negative. Had the defendant published a slightly modified version of Exhibit 154 (plaintiff's request for retraction in copy format, dated 3-15-76) (see Ex. 154, Ex. A attached) it would not be before the court in its present predicament. The correction would have passed muster even if the reference to defendant's negligence had been deleted. Should the defendant have chosen not to print a headline relating to the retraction, a photo of plaintiff in the gossip column next to the correction would have been sufficient to call attention to the retraction.

Instead, defendant tendered to plaintiff and published a "half hearted" correction that had a tendency to aggravate any reasonable person who had been previously libeled. The correction was buried at the bottom of the gossip column.

One can infer from the evidence that the National Enquirer's failure to publish an adequate correction was primarily motivated by an unwillingness to engage in some form of self deprecation which conceivably might adversely affect its circulation

Iain Calder, the President of National Enquirer, knew shortly after March 2, 1976 that none of the libelous material in the article could be substantiated. Both he and Generoso Pope, the sole stockholder and Chairman of the Board of the defendant, approved the copy of the "correction" that appeared in the April 13, 1976 edition of the National Enquirer.

Despite the fact that Calder knew that none of the libelous material could be substantiated, he insisted on using the words "we understand" as a modifier so that a reader could conclude that even though the defendant had no personal knowledge of the events—that the incident *could have* occurred. It should be noted in passing that the March 2, 1976 gossip column contains an apology to Steve Allen for falsely accusing him of smashing in a glass door of the William Morris Agency. The columnist *unequivocally* observed that Steve Allen is not the window breaking type without prefacing the phrase with the words "we understand."

Calder and Pope's cavalier approach to plaintiff's demand for retraction was simply another manifestation of bad faith and malice.

*COMPENSATION DAMAGES*

Included within the sum of $300,000 compensatory damages was the sum of $299,750 general damages [1], representing the jury's award for plaintiff's emotional distress. Plaintiff correctly felt that the article portrayed her as being drunk, rude, uncaring and abusive. This portrayal was communicated to approximately sixteen million readers nationally.

Burnett testified, "What really hurts is that I know most people believe what they read." This belief was

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[1] Plaintiff claimed special damages of $250.00, a sum expended for attorneys fees in order to obtain a retraction.

reinforced when she was taunted by a New York cab driver, whom she never met before, "Hey, Carol, I didn't know you like to get into fights."

Plaintiff is a person who is very sensitive to the problems of alcoholism. Both her parents died at the age of 46 from complications brought about by alcohol abuse. As a result of her tragic experience, Carol Burnett became active in anti-alcohol work. Since the defendant's publication, she has worried about being viewed by the public as a hypocrite if and when she spoke out against alcohol abuse.

While the record is clear that she suffered no actual pecuniary loss as a result of the libelous article, she had every right to suffer anxiety reactions in the immediate aftermath of the March 2, 1976 article and the ineffectual correction. Emotional distress is more difficult to quantify than pain and suffering, but it is no less real. A review of other verdicts for emotional distress is not particularly helpful since the facts of each case vary significantly. The fact that defendant's false publication was communicated to sixteen million readers coupled with an inadequate correction, is of substantial significance in measuring the extent of plaintiff's emotional distress. Finally, the only residual aspect of emotional distress which has lingered with plaintiff since the immediate aftermath of the publication is the fact she occasionally gets a little paranoid about talking too loudly in restaurants.

Defendant points to the fact that Burnett never sought the services of a psychiatrist, psychologist or counselor. Plaintiff acknowledged that she was able to set aside her anxiety to the point where she was able to function in her profession. Miss Burnett should be commended for not seeking the unnecessary services of some "phony build up artist" in order to inflate her damages. She should not be penalized for self-treating.

The court finds that plaintiff was a highly credible witness who did not exaggerate her complaints. Nevertheless, the jury award is clearly excessive and is not supported by substantial evidence. The court finds that the sum of $50,000.00 is a more realistic recompense for plaintiff's emotional distress and special damage.

*PUNITIVE DAMAGES*

In reviewing the award of $1,300,000 in punitive damages the court must consider the reprehensibility of defendant's acts, the wealth of the defendant and whether punitive damages bear a reasonable relationship to actual damages.

The evidence before the court cries out for a substantial award of punitive damages. The conduct of the defendant was highly reprehensible. The acts of fabrication and reckless disregard by Brian Walker are both clearly proscribed by California Civil Code section 3294. Failure by top management to publish an adequate correction is substantial evidence of malice and bad faith.

The defendant's net worth amounted to approximately $2,600,000 and it had earnings of $1,300,000 after taxes for the last ten month period. The court will not consider any evidence not before the jury, to wit: Mr. Pope's salary and dividends. The function of deterrence will not be served if the wealth of the defendant will allow it to absorb the award with little or no discomfort and by the same token, the function of punitive damages is not served by an award that exceeds the level necessary to properly punish and deter.

This court has the distinct impression, after listening to the testimony of certain officers and employees of the National Enquirer, that the defendant has absolutely no remorse for its misdeeds. The only issue defendant has not seriously contested is that the libelous statements were, in fact, false. Couri Hay, the admittedly untrust-

worthy tipster, whose misinformation started this travesty, was promoted to gossip columnist shortly after the article in question was published—a position he still held during the trial. Brian Walker only recently left the employ of defendant. Haydon Cameron, the spokesman for the defendants, asserts that it is the policy of the National Enquirer to publish two or three unflattering articles about celebrities every week.

The defendant engages in a form of legalized pandering designed to appeal to the readers' morbid sense of curiosity. This style of journalism has been enormously profitable to the defendant. While the First Amendment to the United States Constitution permits such journalistic endeavor, it does not immunize the defendant from accountability when the rules are broken in such a flagrant manner.

An award of $1,300,000 will probably not amount to "capital punishment" (bankruptcy), as publicly espoused by defendant's counsel after the jury verdict, because of the defendant's strong cash position. The court finds that it is excessive because it does not bear a reasonable relationship to the compensatory damages that amount to only $50,000. A review of California case law indicates that appellate courts have not sanctioned any particular ratio of general and punitive damages. Each case turns on its own set of facts.

The court finds that there is substantial evidence in the record to support an award of $750,000 in punitive damages, a sum which should be sufficient to deter the defendant from further misconduct.

The motion for judgment notwithstanding the verdict is denied. The motion for new trial is denied because plaintiff accepted the remittitur in open court reducing

actual damages to $50,000 and punitive damages to $750,000.

Dated: May 13, 1981.

/s/ Peter S. Smith
PETER S. SMITH
Judge of the Superior Court

LAW OFFICES
HAYES & HUME
132 South Rodeo Drive
Beverly Hills, California 90212
Telephone (213) 278-8989

March 15, 1976

Meyer Kimmel, Esq.
Kaufman, Taylor, Kimmel & Miller
41 East 42nd Street
New York, New York 10017

Re: Carol Burnett/National Enquirer

Dear Mr. Kimmel:

Pursuant to your request, I have prepared a proposed retraction of the March 2, 1976, article concerning Carol Burnett. I suggest the following:

*RETRACTION OF CAROL BURNETT ARTICLE*

(This headline to be in the same size and in the same place at the top of the column as was the headline in the article.)

On March 2, 1976, this column ran an item about Carol Burnett entitled, "Carol Burnett and Henry K. In Row." We reported certain incidents that supposedly took place in a Washington, D.C. restaurant.

TYPE OF HEARING TRIAL
CASE NO. C 157213
DEFT'S EXH. NO. 154
ADMITTED IN EVIDENCE
DATED 3-16-81
JOHN J. CORCORAN, COUNTY CLERK
BY MICHAEL J. BAGSE, DEPUTY

[Attachment to Superior Court's Opinion]

> We were negligent in printing this article without investigation and as a result, the facts reported were incorrect. Those events did not happen. We apologize to Miss Burnett for making any statement or creating any inference that she was not acting in her usual pleasant and dignified manner.

Miss Burnett has approved of the wording of the foregoing retraction and she is insistent on the language contained therein. She has unequivocally stated that she will not hesitate to file suit against the National Enquirer should this most appropriate retraction not be printed.

Yours very truly,

/s/ Barry B. Langberg
BARRY B. LANGBERG

BBL:gs

[Attachment to Superior Court's Opinion]

## AN ADEQUATE RETRACTION

(Picture of
Carol Burnett
rather than
Priscilla
Presley.)

CAROL BURNETT

On March 2, 1976 this column ran an item about Carol Burnett entitled "CAROL BURNETT AND HENRY K. IN ROW." We reported certain incidents that supposedly took place at a Washintgon, D.C., restaurant. The facts reported were incorrect. Those events did not happen. We apologize to Miss Burnett for making any statements or creating any inference that she was not acting in her usual pleasant and dignified manner.

EXHIBIT "A"

[Attachment to Superior Court's Opinion]

## APPENDIX E

### Notice of Appeal

JOHN G. KESTER
HAROLD UNGAR
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

Telephone: (202) 331-5000

PAUL P. SELVIN
SELVIN & WEINER, P.C.
Suite 2400
1900 Avenue of the Stars
Los Angeles, California 90067

Telephone: (213) 277-1555

*Attorneys for Appellant*



IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

---

Civil No. 66447

CAROL BURNETT,
*Plaintiff and Respondent,*

v.

NATIONAL ENQUIRER, INC.,
*Defendant and Appellant.*

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NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that the National Enquirer, Inc., Appellant herein, hereby appeals to the Supreme Court of the United States from the final judgment of this Court entered July 18, 1983 and modified August 1, 1983, that affirmed except as stated in the last paragraph of the Court of Appeal's opinion the judgment of the Superior Court of the State of California for the County of Los Angeles entered March 26, 1981 as modified by the Superior Court's orders of April 9, 1981 and May 12, 1981, filed May 13, 1981, and the order of the Superior Court filed May 13, 1981 denying Appellant's motions for new trial and judgment notwithstanding the verdict.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

WILLIAMS & CONNOLLY

By: /s/ John G. Kester
JOHN G. KESTER

/s/ Harold Ungar
HAROLD UNGAR
Hill Building
Washington, D.C. 20006
(202) 331-5000

SELVIN & WEINER, P.C.
PAUL P. SELVIN
Suite 2400
1900 Avenue of the Stars
Los Angeles, California 90067
(213) 277-1555
*Attorneys for Appellant*

November 23, 1983

[Certificate of Service Omitted in Printing]

## APPENDIX F

### Constitutional and Statutory Provisions

**Constitution of the United States, First Amendment:**

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Constitution of the United States, Fifth Amendment:**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Constitution of the United States, Eighth Amendment:**

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**Constitution of the United States, Fourteenth Amendment:**

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immu-

nities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

**Civil Code of California, section 45:**

Libel

LIBEL, WHAT. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

**Civil Code of California, section 45a:**

Libel on its face; other actionable defamatory language

A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code.

**Civil Code of California, section 48a:**

Libel in newspaper; slander by radio broadcast

1. Special damages; notice and demand for correction. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter

provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous.

2. General, special and exemplary damages. If a correction be demanded within said period and not be published or broadcast in substantially as conspicious a manner in said newspaper or on said broadcasting station as were the statements claimed to be libelous, in a regular issue thereof published or broadcast within three weeks after such service, plaintiff, if he pleads and proves such notice, demand and failure to correct, and if his cause of action be maintained, may recover general, special and exemplary damages; provided that no exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication or broadcast with actual malice and then only in the discretion of the court or jury, and actual malice shall not be inferred or presumed from the publication or broadcast.

3. Correction prior to demand. A correction published or broadcast in substantially as conspicious a manner in said newspaper or on said broadcasting station as the statements claimed in the complaint to be libelous, prior to receipt of a demand therefor, shall be of the same force and effect as though such correction had been published or broadcast within three weeks after a demand therefor.

4. Definitions. As used herein, the terms "general damages," "special damages," "exemplary damages" and "actual malice," are defined as follows:

(a) "General damages" are damages for loss of reputation, shame, mortification and hurt feelings;

(b) "Special damages" are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other;

(c) "Exemplary damages" are damages which may in the discretion of the court or jury be recovered in addition to general and special damages for the sake of example and by way of punishing a defendant who has made the publication or broadcast with actual malice;

(d) "Actual malice" is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice.

**Civil Code of California, section 48.5:**

Defamation by radio; non-liability of owner, licensee or operator of broadcasting station or network

* * * *

(4) As used in this Part 2, the terms "radio," "radio broadcast," and "broadcast," are defined to include both visual and sound radio broadcasting.

(5) Nothing in this section contained shall deprive any such owner, licensee or operator, or the agent or employee thereof, of any rights under any other section of this Part 2.

**Civil Code of California, section 3294** (as enacted 1872, as amended by Stats. 1905, c. 463, p. 621, § 1):

Exemplary damages; when allowable

In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

**Civil Code of California, section 3294** (as amended by Stats. 1980, c. 1242, p. 4217):

Exemplary damages; when allowable

(a) In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge, ratification, or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others.

(2) "Oppression" means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

**Penal Code of California, section 249:**

PUNISHMENT OF LIBEL. Every person who willfully, and with a malicious intent to injure another, publishes or procures to be published any libel, is punishable by fine not exceeding five thousand dollars, or imprisonment in the County Jail not exceeding one year.

## APPENDIX G

**Opinion of the California Court of Appeal, Second Appellate District, in *Faan* v. *National Enquirer, Inc.*, 78 Cal. App. 3d 543 (1978)**

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

KWOT KIT FAAN,
*Plaintiff and Appellant,*

v.

NATIONAL ENQUIRER, INC.,
*Defendant and Respondent.*

2d Civil No. 51523
(Super. Ct. No. C 172266)

Filed Mar. 13, 1978

Appeal from an order of the Superior Court of Los Angeles County. Philip M. Saeta, Judge. Affirmed.

Plaintiff Kwot Kit Faan appeals from an order by the trial court sustaining the demurrer of defendant National Enquirer, Inc. (hereinafter referred to as Enquirer) to Mr. Faan's complaint for defamation and loss of consortium [1] based on an alleged libel to his wife Marianna Liu. [546]

---

[1] Although the original appeal from the order sustaining the demurrer was premature, the appeal was subsequently perfected when an order of dismissal as to plaintiff-appellant Faan was entered by the trial court.

## *FACTS*

During August of 1976 the Enquirer published two articles concerning the relationship of former President Richard M. Nixon with Marianna Liu. The first article appeared in the Enquirer issue dated August 10, 1976; the second article which dealt with Mr. Nixon, Mrs. Liu and the U.S. Immigration and Naturalization Service appeared in the Enquirer issue of August 24, 1976; and Mrs. Liu served demands for retraction on August 11, 1976, and again on August 19, 1976.

On August 30, 1976, Mrs. Liu filed a complaint for damages which was never served. On August 14, 1976, Mrs. Liu and her husband, Mr. Faan, together filed a complaint entitled "First Amended Complaint for Damages and Loss of Consortium." This complaint, which contained 17 causes of action, was served on the Enquirer. On December 15, 1976, the Enquirer demurred generally and specifically to each of the 17 causes of action.

The trial court overruled most of the Enquirer's demurrers pertaining to the causes of action alleged by Mrs. Liu. However, the demurrers of the Enquirer to each of the causes asserted in behalf of Mr. Faan were sustained with leave to amend in a 30-day period. No amendment of the complaint was thereafter made on behalf of Mr. Faan and counsel at oral argument verified that in their view the allegations were as complete as the factual circumstances of the case would permit.

The notice of appeal declares that Mr. Faan appeals from the trial court's order sustaining the demurrers of the Enquirer to his complaint and dismissing his action. The contentions of plaintiff Faan on appeal are based solely on the ground that the general demurrer was improperly sustained to the cause of action that he attempted to allege for loss of consortium and invasion of privacy. It therefore appears that he has abandoned his

attempt to allege that he was directly damaged by libelous statements made by the Enquirer which named and identified only Mrs. Liu.

In his cause of action for loss of consortium (the seventeenth cause of action in the first amended complaint) Mr. Faan makes, in substance, the following allegations: that he and Mrs. Liu are husband and wife and reside in Los Angeles County; that the Enquirer is a Florida corporation doing business in California; that the Enquirer publishes a weekly newspaper in Los Angeles, California, and throughout the United States [547] that has a wide circulation and is read by large numbers of persons; that Mrs. Liu is a cocktail waitress and her husband is a restaurant owner in the cities of Maywood and Los Angeles; that Mrs. Liu is by virtue of her occupation well known and recognized by many people and that she has at all times enjoyed a good name and reputation in her occupation and with her fellow citizens; that on August 10, 1976, in all editions of the Enquirer the defendants published on the front page and in the text of the paper a picture and article falsely and maliciously and with intent to defame Mrs. Liu; that said article declared in reference to Mrs. Liu: "Nixon Romanced Suspected Red Spy" and "Richard Nixon Dated Hong Kong Hotel Hostess Marianna Liu—While the FBI Was Investigating Her as a Suspected Spy;" that said article was distributed throughout Los Angeles and the United States; that defendants intended and members of the public understood these statements as asserting that Mrs. Liu was a Communist spy when this statement was false, malicious and unprivileged; that this act was intended to and did expose both Mr. Faan and Mrs. Liu to hatred, ridicule and obloquy causing them to be shunned and avoided and proximately causing them to sustain severe and continuing nervous shock and to suffer great mental anguish, humiliation and shame; that on August 11, 1976, Mr. Faan and Mrs. Liu caused to be served on defendants

a demand for retraction pursuant to Civil Code section 48a, subdivision 1; that defendants failed and refused and continue to fail and refuse to publish a retraction; that defendants responded by letter attached as an exhibit and incorporated by reference in which defendants denied that the article printed in their newspaper accused Mrs. Liu of the conduct alleged and asserting that they merely stated facts confirmed by two reporters in an interview with Mrs. Liu.

Mr. Faan in the seventeenth cause of action further alludes to numerous specific statements printed by the Enquirer which allegedly exposed him and his wife to hatred, contempt, ridicule and obloquy including, inter alia: "The FBI's dossier on Nixon's dates with Marianna showed that at first the romance was 'Hot and Heavy', the official revealed," and "William C. Sullivan, former FBI Assistant Director, confirmed to the ENQUIRER as a spy suspect [*sic*]—and that a file on her had been sent to the FBI headquarters in Washington." He alleged that as a proximate result of the conduct of defendants he suffered "loss of consortium, loss of comfort, solace and sexual relations with plaintiff, MARIANNA LIU causing plaintiff KWOT KIT FAAN great mental, physical and emotional strain," and that the articles were published by defendants in the Enquirer with knowledge of their falsity or with a reckless disregard for whether they were true. Wherefore, he prays for general [548] damages for loss of consortium, and for special damages according to proof.

The court sustained the demurrer to the cause of action for loss of consortium with leave to amend on the basis that Faan "did not demand a retraction and his damages are akin to general rather than special damages." The statutory time for filing a retraction is 20 days after knowledge of the publication (Civ. Code, § 48a, subd. 1). Since, as Mr. Faan points out, this time period had long since run at the time the ruling on the de-

murrer was made, he was unable to amend his complaint to cure the defect found by the trial court. Plaintiff Faan thereafter failed to amend the complaint; his attempted appeal from the trial court's ruling has been perfected by order of dismissal subsequently entered.

*ISSUES*

On appeal plaintiff-appellant Faan contends (1) that he sufficiently alleged a cause of action for loss of consortium; (2) that he is protected because this cause of action arose out of the defamatory statements made by defendants-respondents against his wife, Marianna Liu, who did demand a retraction (Civ. Code, § 48a, subd. 1) and after its denial did sue for defamation; and (3) that the demand for retraction which applies only to libel and slander actions is not a condition precedent to his action for loss of consortium which constitutes an independent tort.

*DISCUSSION*

We determine the issues presented on this appeal in the perspective of the statute which is determinative of the rights and remedies of persons affected by the publication of libelous material by a newspaper. Civil Code section 48a, subdivision 1, provides:

> "In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous." [549]

Although the cause of action which is the subject of this appeal is cast in the form of an action for loss of consortium, it is based on the tort of libel to plaintiff-appellant Faan's wife. Consequently, the sufficiency of the allegations is determined by the policies and limitations controlling libel actions. The nature of the injury which is the consequence of the action for loss of consortium is intangible. It is measured not by economic loss but by the value of such elements as loss of "conjugal followship and sexual relations" (*Rodriguez* v. *Bethlehem Steel Corp.* (1974) 12 Cal. 3d 382, 385) and includes, inter alia, loss of affection and society, comfort, protection, support, pleasure, and household services. Leaving aside the nature and difficulty of the proof which we anticipate in an action such as the litigation at bench where the damages of both wife and husband are limited to mental suffering or disturbance, we are persuaded that because plaintiff-appellant Faan may claim in an action for loss of consortium only general damages, he cannot prevail as against the general demurrer of defendants.

"It is of course the general rule that, in the absence of a privilege, anyone who actively participates in the publication of a false and libelous statement is liable for special, general and even punitive damages. . . .

"[However], in this state the general rules allowing general and punitive damages to a plaintiff for the publication of defamatory matter do not apply to newspapers and radio broadcasting stations. To the contrary, the liability of newspapers and radio broadcasting stations for the publication or broadcast of libelous matter has been carefully limited by statute. In fact, under Civil Code section 48a no one who participates in a libelous newspaper publication or radio broadcast, such as a reporter, columnist, author, critic, editor or publisher, is liable for either general or punitive damages unless a retraction or correction is first requested by the plaintiff and refused by

the publisher of the newspaper or the operator of the broadcasting station (*Pridonoff* v. *Balokovich* [(1951)] 36 Cal. 2d 788. Furthermore, to recover general or punitive damages the plaintiff must *plead* and *prove* that he requested a retraction or correction and his request was ignored. . . ." (*Di Giorgio Corp.* v. *Valley Labor Citizen* (1968) 260 Cal. App. 2d 268, 273-274, original italics.)

Section 48a, subdivision 4, defines general and special damages as follows: [550]

> "(a) 'General damages' are damages for loss of reputation, shame, mortification and hurt feelings;
>
> "(b) 'Special damages' are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other."

The limitations on recovery for libel have previously been considered, upheld and reinforced by well reasoned judicial decisions wherein the competing public interests have been resolved. The California Supreme Court in the case of *Werner* v. *Southern Cal. etc. Newspapers* (1950) 35 Cal. 2d 121, determined the constitutionality of Civil Code section 48a and, in refuting objections to the limitations therein prescribed, it declared the presumed legislative objectives. "There are at least two bases on which the legislature could reasonably conclude that the retraction provisions of section 48a provide a reasonable substitute for general damages in actions for defamation against newspapers and radio stations, namely, the danger of excessive recoveries of general damages in libel actions and the public interest in the free dissemination of news.

"General damages are allowed for 'loss of reputation, shame, mortification and hurt feelings' (Civ. Code § 48a),

but the extent of such injuries is difficult to determine. . . . The Legislature could reasonably conclude that recovery of damages without proof of injury constitutes an evil." (*Id.*, at p. 126.)

Plaintiff in the *Werner* case contended that "no public interest is served by the publication of false news and that it is desirable to enforce full responsibility as a deterrent to careless or malicious publication." (*Id.*, at p. 128.) The court observed that although forceful arguments might be made to that effect, the Legislature had adopted the legislation as the appropriate means to reconcile the competing interests and the court must assume it acted in good faith and without improper motive. The court further observed: "[A]lthough it extends its protection to those who may deliberately and maliciously disseminate libels, the Legislature could reasonably conclude that it was necessary to go so far effectively to protect those who in good faith and without malice inadvertently publish defamatory statements. . . ." (*Id.*, at p. 134.) The court thereafter concluded that the interest protected might be satisfied more completely and effectively by a retraction. ". . . [A]s far as vindication of character or [551] reputation is concerned, it stands to reason that a full and frank retraction of the false charge, especially if published as widely and substantially to the same readers as was the libel, is usually in fact a more complete redress than a judgment for damages.' [Citation.] . . ." (*Id.*, at p. 133.)

Accordingly, the appellate court in a subsequent decision sustained a general demurrer to a complaint alleging that a libelous newspaper publication had injured the plaintiff by invading his right to privacy where no request for retraction was made. The court observed, relying on *Fairfield* v. *American Photocopy etc. Co.* (1955) 138 Cal.App.2d 82, that the gist of the cause of action in a privacy case is not injury to character or reputation as in libel, but a wrong of a personal character resulting in

injury to feelings without regard to any effect which the publication might have on property, business, pecuniary interest, or standing in the community. (*Werner* v. *Times-Mirror Co.* (1961) 193 Cal. App.2d 111, 116.) The court noted that the interests protected by the tort of invasion of right of privacy and that of defamation differed. "[B]ut each of such interests conceivably could be invaded by the same publication in a particular case. [Citations.] However, while the appellant in the present case has disclaimed any reliance on the law of libel, it is clear that he could not, in any event, recover under the theory of the tort of libel in the absence of a demand for a retraction and a failure to comply therewith (Civ. Code, § 48a) unless he could establish special damages. (*Jefferson* v. *Chronicle Publishing Co.*, 108 Cal.App.2d 538, 539. . . .) Yet, assuming some of the statements of which the appellant complains in his amended complaint to be libelous in nature, to permit him to recover general damages in this case under the theory of the invasion of his right of privacy is to sanction an evasion of the provision of section 48a of the Civil Code. . . ." (*Werner* v. *Times-Mirror Co.*, *supra*, 193 Cal.App.2d 111, 120-122, fns. omitted; see also *Briscoe* v. *Reader's Digest Association, Inc.* (1971) 4 Cal.3d 529.)

In the case at bench we are confronted with a similar issue. The interests protected by the tort characterized as loss of consortium are personal and incorporate elements of conjugal affection and society and sexual relations while the general damages in a libel action are awarded for injury to the character or reputation of the plaintiff. As the lower court observed, these interests can conceivably be invaded by the same publication, but a plaintiff is not permitted to recover general damages on the basis of a libel without a demand for retraction. We believe that [552] the similarity of the recovery of general damages, in each case a compensation for emotional distress and injury, outweighs any distinction which might be drawn between mental suffering due to damage

to reputation and that due to loss of conjugal society and sexual relations. The legislative intent was to protect publishers in the interests of freedom of speech and the press, from claims for general damages arising out of libelous material which may have been published in good faith, unless the claimant made a request for retraction.

It is conceded by plaintiff-appellant Faan that he neither joined in the request for retraction made by his wife to the Enquirer nor made the effort to observe this formality independently. It is well established by the foregoing authorities that in the absence of a request for retraction, where a cause of action is based on newspaper publication of a libel, *a plaintiff* is limited to special damages resulting from the publication. Special damages include losses suffered in respect to his property, business, trade, profession or occupation (*Di Giorgio Corp.* v. *Valley Labor Citizen*, *supra*, 260 Cal.App.2d 268). Moreover, allegations of special damages are indispensable in an action for defamation where the material published was not as to the plaintiff libelous per se (*Campbell* v. *Jewish Com. for P. Service* (1954) 125 Cal.App.2d 771. It is clear that the material published in the case at bench was not only not libelous per se as to plaintiff-appellant Faan, but did not name or refer to him either directly or indirectly. We also note that the pleadings consistently refer to husband and wife by their different names, e.g., Marianna Liu and Kwot Kit Faan. The newspaper articles refer only to Mrs. Liu.

It is on this basis that plaintiff-appellant Faan contends that he not only was not required to make a request for retraction but that it would not be reasonable for him to make such a request since he was not named in the publication. The question, therefore, is whether the policy of the law legitimately extends to the protection of the interest plaintiff-appellant Faan has asserted which is based upon and derivative of the tort of defamation of the character and reputation of his wife. This court is

persuaded that the remedy for loss of consortium, the thrust of which is the protection of the value of the feelings and activities enjoyed by the couple in the conjugal relationship, is limited under the recent decisions of the California Supreme Court by policy considerations relating to the character of the damages, the nature of the relationship, and the extent of the injury to the spouse. [553]

The California Supreme Court held in *Rodriguez* v. *Bethlehem Steel Corp.*, *supra*, 12 Cal. 3d 382, that California would no longer adhere to the rule that a married person whose spouse was injured by the negligence of a third party had no cause of action for loss of consortium, (that is for loss of conjugal fellowship and sexual relations) as previously established by such decisions as *Deshotel* v. *Atchison, T. & S.F. Ry. Co.* (1958) 50 Cal. 2d 664, and *West* v. *City of San Diego* (1960) 54 Cal. 2d 469.

In the *Rodriguez* case the husband was injured when struck on the head by a falling pipe weighing over 600 pounds. "[T]he blow caused severe spinal cord damage which has left him totally paralyzed in both legs, totally paralyzed in his body below the mid-point of the chest, and partially paralyzed in one of his arms." (*Rodriguez* v. *Bethlehem Steel Corp.*, *supra*, 12 Cal. 3d at pp. 385-386.) As a consequence, his wife's social and recreational life was severely restricted, she was required to leave her employment to nurse her husband through his pain and mental anguish, view and minister to his physiological needs, sacrifice sexual relations and all hope of bearing his children, and become a nurse to him attending to his condition which was apparently permanent. The California Supreme Court considered and rejected one by one former obstacles to the extension of the remedy of loss of consortium to Mary Rodriguez, including stare decisis, usurpation of legislative authority without an enabling statute, indirect nature of the injury, specula-

tive character of damages, potential extension of the remedy to other classes of plaintiffs such as child or parents, fear of double recovery, and concern over retroactive effect of the judicial rule.

It is clear from the language of the *Rodriguez* decision that in extending the remedy for loss of consortium in a case where defendant's negligent act caused grievous physical injury to Richard Rodriguez, the court contemplated essentially the situation in which the defendant engages in conduct which involves the risk of physical harm to another person. The court, alluding to language in its decision in *Dillon* v. *Legg* (1968) 68 Cal. 2d 728, observed that the issue revolved about the determination of foreseeability, since the defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, and the extent of the duty of care depends on the circumstances of each case, including the relationship of the parties and the nature of the threatened injury. (*Rodriguez* v. *Bethlehem Steel Corp.*, *supra*, 12 Cal. 3d 382, 399.) Thus the negligent driver could be held liable for emotional trauma suffered by the mother [554] who witnessed the death of her child struck by his car. Accordingly, the California Supreme Court declared as to the *Rodriguez* case that: "[B]y parity of reasoning, we conclude in the case at bar that one who negligently causes *a severely disabling injury* to an adult may reasonably expect that the injured person is married and that his or her spouse will be adversely affected by that injury. . . ." (*Id.*, at pp. 399-400, italics added.)

In the period that has elapsed since the decision in *Rodriguez* the California Supreme Court has had occasion to limit the rule in that case. It has held that a child has no cause of action for the negligently caused loss of the affection and society of a parent (*Borer* v. *American Airlines, Inc.* (1977) 19 Cal. 3d 441; and that parents can state no cause of action for the loss of the affection and society of their child (*Baxter* v. *Superior Court*

(1977) 19 Cal. 3d 461). The court in so holding observed: "Judicial recognition of a cause of action for loss of consortium, we believe, must be narrowly circumscribed. Loss of consortium is an intangible injury for which money damages do not afford an accurate measure of suitable recompense; . . ." (*Borer* v. *American Airlines, Inc., supra*, 19 Cal.2d 441, 444.) The court based its decision on the necessity of drawing reasonable limitations since not every loss can be made compensable in money damages and legal causation must terminate somewhere. It took cognizance of the social burden of proving the damages and the cost of the burden of payment of such awards which must be borne by the general public in the form of increased insurance premiums or the enhanced danger that accrues from the choice of many persons to go without insurance, and the cost of administration of a system to determine and pay consortium awards. The court emphasized the inadequacy of money damages to alleviate the injury and the difficulty of their proof and measure in light of the social cost of paying such awards. (*Borer* v. *American Airlines, Inc., supra*, 19 Cal.3d 441, 447.)

In view of the foregoing considerations of policy and the character of the damages and cause of action in loss of consortium as described in the *Rodriguez* decision, we hold that such a remedy should not be extended to the instant situation which involves the alleged publication of a libel as to the spouse of the claimant (plaintiff-husband herein) as distinguished from the situation where the defendant drives an automobile or engages in heavy construction activity of an inherently hazardous character. [555]

Accordingly, the trial court properly upheld the demurrer of defendants on the ground that plaintiff-appellant Faan "did not demand a retraction and his damages are akin to general rather than special damages."

*DISPOSITION*

The judgment of dismissal is affirmed.

*CERTIFIED FOR PUBLICATION*

HANSON, J.

We concur:

LILLIE, Acting P.J.
THOMPSON, J.

No. 83-1076

IN THE

# Supreme Court of the United States

October Term, 1983

NATIONAL ENQUIRER, INC.,

*Appellant,*

*vs.*

CAROL BURNETT,

*Appellee.*

**ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT.**

## APPELLEE'S MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM FOR LACK OF JURISDICTION, SUBSTANTIAL FEDERAL QUESTION, AND FRIVOLOUSNESS.

BARRY B. LANGBERG,
STEPHEN S. MONROE,*
PAUL S. ABLON,
RICHARD P. TOWNE,
SUSAN R. SCHWARTZ,
132 South Rodeo Drive,
Beverly Hills, Calif. 90212,
(213) 858-2050,
*Attorneys for Appellee Carol Burnett.*

*Of Counsel:*
HAYES & HUME,
132 South Rodeo Drive,
Beverly Hills, Calif. 90212.

**Counsel of Record*

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

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## APPELLEE'S MOTION TO DISMISS OR IN THE ALTERNATIVE AFFIRM FOR LACK OF JURISDICTION, SUBSTANTIAL FEDERAL QUESTION, AND FRIVOLOUSNESS.

Carol Burnett ("Burnett"), Appellee, moves pursuant to Rule 16 to dismiss Appellant National Enquirer, Inc.'s purported appeal for want of jurisdiction, failure to present a substantial federal question, and frivolousness.

Alternatively, Burnett moves that the decision of the California Court of Appeal, Second Appellate District, be affirmed[1] as presenting no substantial issue requiring further argument or consideration.

Burnett further requests that in the event this Court considers Appellant's Statement as to Jurisdiction ("Stmt.")

[1]This request should be viewed consistently with Appellee's continuing objection to the remittitur, as an affirmation of her right to proper damages, and not a waiver of her contention that the judgment of the Superior Court, as modified, granted appropriate relief.

as a Petition for Certiorari pursuant to 28 U.S.C. § 2103 (1982), such Petition should be denied for failure to demonstrate any significant conflict of authority.

**INTRODUCTION.**

Appellant National Enquirer urges two primary issues in its Statement as to Jurisdiction, one of which the Appellant itself, in briefs filed in another court, has admitted is an "abstract or academic" issue that is "hypothetical" and "not now ripe." These were the words used by Appellant, in litigation with its insurance carrier, to describe the status of the case at bar with respect to whether punitive damages, founded upon any statute, are now at issue in this case.

The other issue presented to this Court by Appellant, challenging the constitutionality and application of CAL. CIV. CODE § 48a (West 1982) ("§ 48a"), finds the National Enquirer urging the unconstitutionality of a retraction statute which the Appellant was found by the trial and appellate courts not to have complied with. The Enquirer contends that the trial and appellate courts, having classified it as a magazine and not a newspaper within the terms of § 48a, acted unconstitutionally. However, before that issue can be considered, the Enquirer must explain away the fact that since it was found not to have conformed to the terms and standards of § 48a, the Enquirer would not have been entitled to its limitations on damages even if it had been found to be a newspaper.

Thus, in a case where the trial court found that:

> "not only did Plaintiff establish actual malice by clear and convincing evidence, but she proved it beyond a reasonable doubt" (p. 53a);

and the California District Court of Appeal held that:

> ". . . while Appellant's representatives knew that part of the publication complained of was probably false

> and that the remainder of it in substance might very well be, it was *nevertheless determined to present to a vast national audience in printed form statements which in their precise import and clear implication were defamatory*, thereby exposing respondent to contempt, ridicule and obloquy and tending to injure her in her occupation. We are also satisfied that even when it was thought necessary to alleviate the wrong resulting from the false statements it had placed before the public, the retraction proffered was evasive, incomplete and *by any standard, legally insufficient*. [citations] In other words, *we have no doubt* the conduct of appellant respecting the libel *was reprehensible and was undertaken with the kind of improper motive which supports the imposition of punitive damages*;" (pp. 25a-26a) (*emphasis added*)

the National Enquirer seeks to present issues for jurisdiction to this Court which not only are without substantive merit, but are also essentially moot.

**THE SIGNIFICANCE OF CIVIL CODE § 48a.**

It is ironic that the Enquirer, having been judged by clear and convincing evidence to be beyond the sanctuary of the First Amendment protections established by *New York Times v. Sullivan*, 376 U.S. 254 (1964), now seeks last refuge within the embrace of the California retraction statute, one of only two in the country[2] which afford protection to the intentional and malicious libeler. *Werner v. Southern California, etc. Newspapers*, 35 Cal.2d 121, 134; 216 P.2d 825, 833 (1950), *appeal dismissed on motion of appellant*, 340 U.S. 910 (1951). § 48a completely insulates a newspaper[3] *from any general or punitive damages* (includ-

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[2]*See also* NEV. REV. STAT. § 41.336, the only other such statute of which Appellee is aware.

[3]§ 48a also applies to radio; CAL. CIV. CODE § 48.5 (West 1982) applies to television.

ing non-quantifiable but provable injury to reputation) if the plaintiff does not timely demand a retraction (which she indisputably did in this case), or if, after a demand, the defendant retracts as conspicuously as the original libel within three weeks after the demand. Moreover, if a newspaper fails to publish a proper or timely retraction, it is still protected from punitive damages unless the plaintiff proves that the libel was promulgated with actual malice, which is defined as hatred or ill will toward the plaintiff without a good faith belief in the truth at the time of publication. (pp. 68a-70a).

As appears in detail from the challenged opinion, California has traditionally and rationally excluded non-newspaper publications because the legislature intended drastic limitations on libel remedies to inure only to the benefit of those "who, in good faith and without malice inadvertently publish defamatory statements" (*Werner*, *supra*, at 134; 216 P.2d at 833), who engage in publishing "news while it is new," (*Morris v. National Federation of the Blind*, 192 Cal.App.2d 162, 165; 13 Cal.Rptr. 336, 338 (1961)), and who "cannot always check their sources for accuracy and their stories for inadvertent publication errors." *Field Research Corp v. Superior Court*, 71 Cal.2d 110, 114; 77 Cal.Rptr. 243, 246; 453 P.2d 747, 750 (1969). This rationale is responsible for the recognition that two theoretically separate standards[4] for punitive damages exist depending upon "newspaper" or "non-newspaper" status. *DiGiorgio v. Valley Labor Citizen*, 260 Cal.App.2d 268, 274; 67 Cal.Rptr. 82, 87 (1968).

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[4]§ 48a hatred or ill will as opposed to CAL. CIV. CODE § 3294 (West 1970) ("§ 3294") conscious disregard. There may, as in this case, be no practical difference based on the evidence, when *New York Times* malice has been proved (by publication of a known falsehood) "beyond a reasonable doubt." (p. 53a).

**APPELLANT'S RETRACTION ARGUMENTS ARE BARRED BY INDEPENDENT STATE SUBSTANTIVE AND PROCEDURAL GROUNDS.**

As Appellant is aware, there are three hurdles which it must mount before it may even present its § 48a arguments to this Court.

1. The Court of Appeal, holding that Appellant's purported retraction was "by any standard, legally insufficient" (p. 25a), has determined that even if § 48a were constitutionally required to be applied, *the Enquirer did not comply with it*. Thus, Appellant's retraction does not entitle it to § 48a's protections. As a matter of law, based upon a binding evidentiary determination with unshakeable support in the record, there is an independent substantive state ground supporting the judgment.

2. Appellant's claims of unconstitutionality were not raised at the earliest opportunity or properly in the trial court, which is glaringly obvious from the Enquirer's total and purposeful non-compliance with Rule 15(g). Thus, a procedurally adequate independent state ground negates all § 48a constitutional arguments.

3. The evidence of actual malice in the sense of ill will is overwhelming, thus leading to the inescapable conclusion that even if § 48a were applied under new and different instructions, the result would not be different.

**A. It Ill Befits Appellant to Complain About § 48a When It Did Not Satisfy the Legal Preconditions to Its Application as a Matter of Law.**

Appellant's answer, filed in 1976, pleaded compliance with § 48a as an affirmative defense. (CT 76)[5] The trial court, concluding that the Enquirer was not within the pro-

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[5]To avoid a lengthy appendix to this motion, "CT" will be used to designate references to the Clerk's Transcript (documents) contained in the state appellate record. "RT" and "Ex." refer to Reporter's Transcript and evidentiary exhibits by number. Appellant may, in reply, reproduce any cited portions of the record should it take issue with Appellee's descriptions.

tections of § 48a, nonetheless passed on the sufficiency of the retraction in the context of mitigation of general and punitive damages, describing it as "half-hearted" with "a tendency to aggravate any reasonable person. . ." (p. 56a). Its pronouncement took the following form:

> "Preliminary to the subject of general and punitive damages is the question of whether defendant published an adequate correction since that is an issue relating to the mitigation of damages. In the present case, two critical questions must be answered:
>
> 1) Was the correction published with prominence substantially equal to the statement claimed to be libelous?
>
> 2) Did the correction without uncertainty and ambiguity honestly and fully and fairly correct the statement claimed to be libelous?
>
> The answer to both questions is in the negative." (p. 56a).

Judge Smith was duly impressed that at the time of the purported retraction, Appellant's President Calder "knew . . . that none of the libelous material . . . could be substantiated." (p. 57a) The fact that Calder denied falsity under penalty of perjury in Appellant's verified answer, served months after the retraction was published (CT 72, 81), obviously has not helped its position on appeal. The jury, presented with an instruction on retraction not challenged in any appeal in this case, obviously agreed with Judge Smith. (CT 1230-1231).

So did the Court of Appeal, which stated:

> "The retraction appeared as the eighth item of a ten-item gossip column, whereas the libelous item was contained as the fourth item. The headline to the gossip column containing the retraction failed to make any reference to the retraction although the defamatory item was highlighted by a large headline at the top of the

column. Even though the original defamatory item was further emphasized by its placement adjacent to a picture of Barbara Walters, the retraction was not placed next to a picture of a prominent celebrity. The purported retraction was also substantially shorter and occupied less column space than the original item. It repeated the substance of some of the defamatory statements while failing to refer to others. Most notably, it never stated that Carol Burnett was not inebriated. By inference it suggested that only the few published statements were false while the rest must have been true. It equivocated by ambiguously stating 'we understand' that the events did not occur."

It is against the backdrop of this record that Appellant baldly asserts it was deprived of its day in court on the issue of whether it, as a publication which had the luxury of weeks in normal operation to verify its materials, was entitled to the benefit of a statute designed to protect those who could not, from the nature of their media, take that long.

It is well established that a federal claim will not be entertained where the judgment rests on an adequate and independent state ground. *Webb v. Webb*, 451 U.S. 493, 500 (1981). Such is, beyond question, the instant case. Respondent is entitled as a matter of law to general damages of $50,000, and no federal claim can resurrect § 48a's retraction provisions to bar her right to seek exemplary damages. The disposition of Appellant's arguments as to the applicable standard for punitive damages, based upon independent state grounds, is discussed under those sections of this motion which relate to timeliness and the improbability of a different judgment should Appellant prevail.

**THE ALLEGED UNCONSTITUTIONALITY OF § 48a IN ANY RESPECT WAS NOT RAISED TIMELY OR PROPERLY BELOW BY APPELLANT.**

In 1976, the Enquirer and its counsel should have been aware, under general principles of California procedural law, that Appellant's affirmative defense of protection under

the retraction statute was deemed controverted. CODE CIV. PROC., § 431.20(b) (West 1973). Specifically, a substantial body of California law *then* held that magazines, by their publisher's choice, are not under pressure which would, as a practical matter, forbid sufficient time for verification. Magazines and other publications not under the time constaints of newspapers were thus not included within the protections of § 48a. (pp. 10a-13a). This body included at least one case which rejected an equal protection argument similar to that made today, and which undoubtedly sensitized the Enquirer to the subject. *Werner, supra*, at 130-134; 216 P.2d at 831-835. Not only did the plaintiff's First Amended Complaint, filed in July of 1976, describe the Appellant as a "newspaper or news magazine" (CT 54), but Judge Robert Weil's ruling of December 24, 1980, made it clear that the Enquirer's status as to protection under § 48a was at issue during trial. (CT 522-523). In the first days of trial, Appellant urged Judge Smith to decide the issue as one of law (p. 8a, n.4), which he did. Knowing full well that it could lose, Appellant made no argument of unconstitutionality of any kind, let alone one premised upon the Equal Protection Clause. At the critical hearing, as pp. 44a-51a demonstrate, not one claim of unconstitutionality was made in argument. Appellant's brief, filed at that hearing, is similarly devoid of such argument or citation. (CT 545-567). So is Appellant's general trial brief. (CT 586-631). Knowing that the court would instruct the jury other than in the terms of § 48a, Appellant filed no brief or motion for reconsideration prior to or during the instructions, *which were not given until days after the § 48a ruling*. After an entire day of argument on instructions, the best Appellant could do was offhandedly, without specifics, and for the first time mention in a brief sentence that it believed the statute violated Equal Protection guarantees. (CT 1342). It

made no motions, provided no authorities, requested no delay in instructing the jury and filed no briefs. This clearly falls within the proscription against dubious, hesitant or insincere presentations. *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 763 (1946). The first time any issue was seriously raised was after the trial and verdict in a motion for new trial, and this was only of facially unconstitutional underinclusion, to be repeated before the Court of Appeal but not seriously argued here. All other § 48a arguments were raised for the first time on appeal.

It is hornbook procedural law in California that constitutional questions "must be presented at the earliest opportunity" or waived. *Geftakys v. State Personnel Board*, 138 Cal.App.3d 844, 864; 188 Cal.Rptr. 305, 317 (1982); *Bidart Brothers v. Elmo Farming Co.*, 35 Cal.App.3d 248, 263; 110 Cal.Rptr. 819, 828 (1973). As noted in *Estate of Crane*, 73 Cal.App.2d 93, 101-102; 165 P.2d 940, 944 (1946), a case containing appropriate language but involving a substantially greater lapse of time:

> "[T]he question of constitutionality, if any there was, must have been as fully apparent [then] . . . Nor is any claim made that this matter could not have been discovered and presented at an earlier date.
>
> * * * * * *
>
> "[W]hen appellant did finally take exception . . . [there was] no assertion that the section in question was unconstitutional . . . If the appellant then had in mind the constitutional question so extensively argued in the briefs, it is indeed strange that such an important objection should not have been *positively and concretely presented to the trial court*." (*emphasis added*).

The Court of Appeal and the California Supreme Court, both confronted by the Enquirer's arguments, silently declined to reach the merits after being reminded by Respon-

dent of the timeliness issue.

This Court requires rigor in the application of its law mandating timely and adequate presentation of federal claims below. Such presentation aids in developing the record needed to adjudicate the federal issue, and insures that if there are adequate and independent state grounds which would pretermit the federal issue, they will be acted upon. In *Webb, supra* at 501, it is in that context succinctly stated:

> "At the minimum . . ., there should be no doubt from the record that a claim under . . . the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law."

In the absence of a showing of adequate presentation, there is no jurisdiction (*Id.* at 497-498), and hence no jurisdiction here on any § 48a Equal Protection or vagueness claims.

**EVEN IF § 48a GOVERNS, PUNITIVE DAMAGES WERE PROPERLY AWARDED, THUS RENDERING THAT ISSUE MOOT.**

Appellant maintains that invocation of § 48a(4)(d)'s "ill will" requirement in the trial court would have insulated it completely from punitive damages, as plaintiff ostensibly cannot prove ill will. (Stmt., p. 8). It would therefore have this Court reverse with directions to enter an order that no punitive damages can be awarded, or alternatively reverse for retrial under new § 48a instructions as to whether any such damages may be awarded. The Enquirer apparently seeks to persuade this court that its time and effort in reviewing the question will likely produce a different judgment or a significantly different result. Such a perspective is neither justifiable nor rational.

The Enquirer fails to explain how its publication, with knowing falsity in part and with serious doubt as to truth

in part, of "statements which in their precise import and clear implication were defamatory" (p. 25a), which conveyed ridiculous, boorish, drunken and generally objectionable conduct, and which were contained in an article "libelous on its face" (p. 27a), a conclusion which to all is "abundantly clear" (p. 27a), is evidence of conduct motivated by other than ill will. Indeed, it defies logic to argue that publication of a false article, with constitutional malice, which reflects in an obviously derogatory way on its subject, is not strong circumstantial evidence of the *ill will* required by § 48a should it apply. As stated in *Fopay v. Noveroske*, 31 Ill.App.3d 182, 197-198; 334 N.E.2d 79, 92 (1975):

> "[W]e believe that conduct sufficiently reckless to satisfy *New York Times evidences ill will* and wanton disregard of the effect of the libel upon the plaintiff and satisfied common law malice requirements which will sustain an award of punitive damages." (*emphasis added*)

*See also*, *Bindrim v. Mitchell*, 92 Cal.App.3d 61, 74-75; 155 Cal.Rptr. 29, 36-37 (1979), *hg. denied* (1979), *cert. denied* 444 U.S. 984 (1979), *rehearing denied* 444 U.S. 1040 (1980) (*New York Times* malice, without more, sufficient in public figure libel case for punitive award).

The necessity of ill will often being proven by circumstantial evidence is not new to California. Defendants seldom talk with any degree of candor about precisely what was on their mind at the time of publication. Hatred or ill will is therefore provable "by indirect evidence." *Davis v. Hearst*, 160 Cal. 143, 160; 116 P. 530, 538 (1911). California courts have therefore traditionally permitted malice in fact to be proven by:

> "the circumstance, if it be found to exist, of wanton recklessness and heedlessness of plaintiff's rights."

*Scott v. Times Mirror Co.*, 181 Cal. 345, 362; 184 P. 672, 680 (1919). In the latter case, it is stated authoritatively:

> "[W]here punitive or exemplary damages are sought in an action for civil libel, any evidence . . ., having logical tendency to prove that the publication was prompted by actual malice, is material, competent and relevant . . . [I]f there was any question about the state of our law, there is none now.
>
> * * * * * *
>
> "The plaintiff has to show what was in the defendant's mind at the time of the publication, and of that no doubt the defendant's acts and words on that occasion are the best evidence."

*Scott, supra* at 362; 184 P. at 681.

Not only can ill will be proven by constitutional malice (*Fopay, supra*) and recklessness or heedlessness (*Scott, supra*), which is "ill will's equivalent" (*A.B.C. Needlecraft Co. v. Dun & Bradstreet, Inc.*, 245 F.2d 775, 777 (2d Cir. 1957)), but also by the failure to publish a proper retraction (*Turner v. Hearst*, 115 Cal. 394, 402-403; 47 P. 129, 132 (1896)), exaggerated, colored or overdrawn language (*White v. State of California*, 17 Cal.App.3d 621, 639; 95 Cal.Rptr. 175, 180 (1971)), and failure to properly investigate (*DeRonde v. Gaytime Shops*, 239 F.2d 735, 738-739 (2d Cir. 1957)), all of which are in evidence here. Moreover, evidence of Appellant's employees' acts and language (*Scott, supra*) reveals that the Enquirer was unequivocally told plaintiff was "specifically, emphatically" not drunk (RT 340-341, 325), that defendant was aware the story was not confirmed (RT 700, 704, 706), that defendant was critical of its employees because the story was not being confirmed (RT 502), that defendant knew there was no argument or row as stated in the headline (RT 725, 743), that defendant thought the story was "gross" and would probably have to

be "cleaned up" (RT 437), that defendant wanted to run the story (RT 489), and that defendant's employees agreed that its source for the story could not be trusted. (RT 436).

Aside from this and other evidence of equal weight too voluminous to mention, there was fabrication.

> "The acts of fabrication and reckless disregard by Brian Walker are both clearly proscribed by California Civil Code Section 3294." (p. 59a).

Of course, actual malice can always be proven by knowing publication of a falsity. *Davis, supra* at 167; 116 P. at 542 ("conclusive evidence"); *DiGiorgio Fruit Corp. v. AFL-CIO*, 215 Cal.App.2d 560, 574; 30 Cal.Rptr. 350, 358 (1963) ("conclusive"); *Roemer v. Retail Credit Co.*, 3 Cal.App.3d 368, 372; 83 Cal.Rptr. 540, 543 (1970) (even "apparent to laymen"); *MacLeod v. Tribune Publishing Co.*, 52 Cal.2d 536, 552 n.3; 343 P.2d 36, 45 (1959) (that fabrication suggests bad faith is "inescapable"). These authorities are in general line with punitive damage and conditional privilege cases throughout the United States on the subject of knowing publication of falsity. *Morgan v. Dun & Bradstreet, Inc.*, 421 F.2d 1241, 1242-1243 (5th Cir. 1970) ("proof of malice" — punitive award upheld); *Diplomat Electric, Inc. v. Westinghouse Electric Supply Co.*, 430 F.2d 38, 47 (5th Cir. 1970) ("That was . . . strong evidence of malice"); *Durso v. Lyle Stuart, Inc.*, 33 Ill.App.3d 300, 306; 337 N.E.2d 443, 448 (1975); *Conrad v. Allis-Chalmers Mfg. Co.*, 228 Mo.App. 817, 832; 73 S.W.2d 438, 446 (1934). Perhaps the statement of the court in *Warren v. Pulitzer Publishing Co.*, 336 Mo. 184, 210; 78 S.W.2d 404, 418 (1934) sums it all up:

> "Proof of the falsity of the facts and knowledge of such falsity is proof of actual malice [citation], because *that does, unquestionably show a wrong motive*." (*emphasis added*).

Given these authorities, the strong facts, proof of constitutional malice beyond a reasonable doubt, and the Court of Appeal's statement, it had "*no doubt*" (p. 25a) that Appellant had "the kind of improper motive which supports the imposition of punitive damages" (p. 26a), is there any doubt *that Appellant actually proved ill will*?

Improper motive having been established, under the California Constitution and statutes which require a miscarriage of justice, there was no conceivable ground for reversal based upon an allegedly improper punitive damage instruction.

> " 'The short answer to this contention is that, assuming arguendo that failure to give such instruction was error, it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of error. (citations)' "

*Agarwal v. Johnson*, 25 Cal.3d 932, 951; 160 Cal.Rptr. 141, 151; 603 P.2d 58, 68 (1979); *See also* CAL. CONST. art. VI, § 13; CODE CIV. PROC. § 475 (West 1973).

There is thus a clear, adequate and independent state substantive ground, *the proven and established existence of actual ill will*, which moots defendant's contentions. There is also an independent state procedural ground, the harmless error doctrine, even if defendant's arguments have technical merit. In either case, there is no jurisdiction.

**THE EQUAL PROTECTION ARGUMENTS ARE UNMERITORIOUS.**

Appellants argue that § 48a is under-inclusive and is administered capriciously, though regular on its face.

The first argument is without substance. *Werner, supra* at 130-134; 216 P.2d at 831-835, *appeal dismissed on motion of appellant*, 340 U.S. 910 (1951); *Jefferson v. Chronicle Publishing Co.*, 108 Cal.App.2d 538; 238 P.2d 1018,

*appeal dismissed for want of a substantial federal question*, 344 U.S. 803 (1952), *rehearing denied* 344 U.S. 882 (1952); *Werner v. Hearst Publishing Co.*, 297 F.2d 145, 149 (9th Cir. 1962); *Anderson v. Hearst Publishing Co.*, 120 F. Supp. 850, 852 (S.D.Cal. 1954).

This opinion's rationale of what constitutes a newspaper makes the claim of invalidity even less tenable, because its test is focused on the reason for the statute, and not on what in popular concept or appearance is a newspaper. Appearances, as in the case of the Enquirer, can be misleading. The statute protects publishers who cannot, because of the demand to rapidly disseminate news and the short time lapse from its acquisition, reasonably verify their material, while denying protection to those who, as a matter of free choice, have pursued a course of business which permits ample time. Appellant does not explain how such a test creates arbitrary or unreasonable classifications, because the test does not, and Appellant cannot.

To prove capricious administration, Appellant cites cases prior to this opinion as "holdings" which show, in its opinion (Stmt., pp. 11-12), inconsistent application. To describe these opinions as "holdings," when they do not even rise to the dignity of dicta, is simply incorrect. *Not one* involved an evidentiary hearing, findings of fact, or even a discussion of what was and was not, in theory, a newspaper for purposes of § 48a. Those which Appellant claims involved columnists, authors, critics and editorials (Stmt., p. 12) all involved publications *assumed, but never decided to be*, newspapers. Those which Appellant claims involve *The Saturday Evening Post, Reader's Digest* (Stmt., p. 11), or books (Stmt., p. 12) have all been expressly criticized as not having discussed the issue in published opinions relied upon by Respondent. The case of *Faan v. National Enquirer*, 2d Civ. 51523, March 13, 1978, cited by Appellant,

was *specifically ordered unpublished* by the California Supreme Court pursuant to Rule 976 of the California Rules of Court, has no force or authority under California law, and also fails to discuss what is a newspaper under the retraction statute. Moreover, under Rule 976, it is specifically *prohibited from being cited*. Decertification orders are generally reserved for opinions which do not correctly state the law or are otherwise unacceptable.

Three of the opinions upon which Respondent and the California Court of Appeal rely have been in effect reviewed upon petition for hearing to the California Supreme Court.[6] These authorities are particularly precedential, because they discuss and analyze all previous cases, discuss the rationale of the statute, criticize prior California Supreme Court dicta and even predict the way the Court would rule on the issue. This case clears up any confusion in California law, adopting and following the well-reasoned authoritative exposition of controlling principles contained in previous cases.

How is Appellant the victim of arbitrary and unlawful discrimination under a statute constitutional on its face (*Yick Wo v. Hopkins*, 118 U.S. 356 (1886)) because a court rationally reconciles previous cases and determines on the basis of authority, some predating the opinion by 22 years, that Appellant is not within the protections of § 48a? Appellant points to no case involving appellate construction of a statute where an "equal protection-discrimination as ap-

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[6]*Montandon v. Triangle Publications, Inc.*, 45 Cal.App.3d 938; 120 Cal.Rptr. 186 (1975), *h'g. denied* (1975), *cert. denied* 423 U.S. 893 (1975), discusses *Morris, supra*, and disapproves *Briscoe v. Reader's Digest Association, Inc.*, 4 Cal.3d 529; 93 Cal.Rptr. 866; 483 P.2d 34 (1971), heavily relied upon by Appellant, as dictum. The California Supreme Court took no umbrage and denied a hearing. *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777 (9th Cir. 1975), *cert. denied* 423 U.S. 930 (1975), *Montandon* and *Morris* were all in effect reviewed by denial of a hearing in this case.

plied'' claim has been sustained using two ostensibly conflicting lines of authority as evidence. Perhaps that is why the argument was not raised in the trial court, Court of Appeal, or California Supreme Court. It is certainly consistent with Appellant's subtle attempt to suggest, without proof, and oblivious to this record, that it is a ''victim'' solely because it is the National Enquirer, and not because it acted reprehensibly.

**THE UNCONSTITUTIONAL DISTINCTION ARGUMENT IS WITHOUT MERIT.**

Appellant claims that a determination as to what is a newspaper for purposes of § 48a necessarily involves a Court's ''subjective impressions of newsworthiness of its content.'' (Stmt., p. 14). This statement is not an accurate reflection of the record.

The trial court's reasoning, based upon the reception of voluminous evidence, is found in its new trial order (pp. 54a-55a) and the transcription of oral argument. (pp. 44a-51a). Its comments, singularly and taken as a whole, show unwavering concern with the rationale and policy of the statute. (pp. 46a, 47a, 54a-55a) That policy, as explained and cited at length in the instant opinion (pp. 8a-9a; 10a-14a) and other authority on point (*Rudin v. Dow Jones & Co., Inc.*, 510 F. Supp. 210, 217 (S.D.N.Y. 1981); *Application of Cepeda*, 233 F. Supp. 465, 472-473 (S.D.N.Y. 1964)), clearly focuses on the ability of a publisher to verify its news within the time constraints afforded by the general type of business he has chosen. Thus *indicia of timeliness*, not substance or content, are the key. What is or is not news is irrelevant, the question being when articles are normally published with reference to when their subject matter first occurs.

For example, a story about a given event could be published in a daily, which would generally mean next day or day after dissemination. Thus, the event occurring on day 1 would be the subject of a story usually published on day 2 or day 3. It could be published in a weekly, which could, depending on the publisher's judgment, mean publication on day 2, 3, 4, 5 or 6. What Appellant purposefully overlooks is that it could also be published on day 7, day 13 or day 22, especially if the publisher has decreed a general lead time, as in this case, of one to three weeks (p. 7a) for most of its stories, and his organization functions predominantly within that framework.

Using the example of the daily, there would, based upon the general conduct of the business, be insufficient time for detailed investigation and verification. Given the example of a weekly which as a matter of policy publishes the bulk of its stories on day 22, there would be ample time for investigation and verification, and thus no need for the stringent protections and immunities of the retraction statute. Given the example of a weekly which publishes as a matter of policy anywhere between day 2 and perhaps day 10, there is a gray area in which it becomes a question of fact (*Vescovo v. New Way Enterprises Ltd.*, 60 Cal.App.3d 582, 587; 130 Cal.Rptr. 86, 88 (1976)) as to whether there is generally sufficient time to investigate and verify in the ordinary course of the business which the publisher has chosen.

Evidence of the publisher's normal policies in terms of lead time or time to verify clearly should be considered. This may but need not be found in the publication itself, in the form of the absence of attributions to wire services, the absence of references to time, and the absence of coverage of fast-breaking subjects. Direct testimony of those engaged in production may also be taken, as was done here with respect to lead time.

In combination, there was in this case direct testimony and documentation that Appellant did not call or consider itself a newspaper (Ex. 22, 23; RT 841-842, 938), did not attribute articles to wire services (RT 942), did not cover current subjects (p. 7a), did not make reference to recent time in its articles (p. 7a), competed with magazines for advertising (RT 966), did not generate news day to day (p. 7a), used a formula presentation including the same types of stories week after week (p. 7a) (clearly not dictated by hot news), had a "rush" about Respondent which languished in excess of a month before publication (Ex. 7), and had a volume of rushes which by testimony most favorable to Appellant constituted but 13% of its volume. (RT 1007-1008). Defendant's President testified to statistics showing 6%. (RT 569). On this evidence, Judge Peter Smith stated that the issue wasn't "even close". (pp. 47a, 49a).

Clearly, a judge passing on newspaper status neither censors content, nor is interested in content for content's sake, nor is he compelled to even read the publication. If he reads it at all, he is only interested in its reflections upon the sufficiency of time to verify facts in the normal course of business.

Paradoxically, the Enquirer would, for purported lack of standards, deny the right and ability of a court to determine what publication qualifies as a newspaper, based upon news while it is new, but would insist on its right to present evidence of "hot news" dissemination in the same libel action in order to thwart claims of constitutional malice under California (*Widener v. Pacific Gas & Electric Co.*, 75 Cal.App.3d 415, 434; 142 Cal.Rptr. 304, 314 (1977), *cert. denied* 436 U.S. 918 (1978)), and federal law. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 157-159 (1966). Would defendant's weekly publication, containing stories which "happened" no earlier than 6 days prior, be inad-

missible at the Enquirer's behest as an unconstitutional inquiry into content?

All of Appellant's cited authorities are in areas of taxation, censorship or restrictions upon distribution. § 48a is involved with none. Appellant, fully disarmed notwithstanding the bastion of the First Amendment, seeks to employ free speech principles in striving for the stricter but unreachable protections of a state statute which involves neither the power to tax nor prohibit. Appellant can always change its lead time, coverage, or market if it desires to qualify for the statute. Otherwise, it can rest solely on what it must perceive to be the admittedly inferior clear and convincing evidence requirements of *New York Times* and publish anything it wants to anyone anywhere. There is hardly a cognizable chilling effect from being forced to such a choice.

**THE VAGUENESS ARGUMENT IS WITHOUT MERIT.**

Utilizing another argument it did not raise in the trial court or any previous appellate court, Appellant claims *unconstitutional vagueness* caused it to sacrifice its right not to print a retraction.

Appellant printed the retraction because, if it did not, and were later held to be a newspaper, it could not benefit from § 48a. It also undoubtedly printed the retraction to lay the foundation for a claim of mitigation of damages, which the trial judge subsequently renounced. Interestingly, the jury instructions on retraction were virtually identical to those which would be required by § 48a, except they require retraction within a reasonable time, as opposed to the three weeks prescribed by the statute.

Appellant, elevating estoppel to asserted constitutional dimensions, suggests it suffered "detriment" in its attempt to embrace § 48a. Its failure to retract, as a fabricator and

one which had acted with reckless disregard, would have left it completely exposed. No possible claim of mitigation, no § 48a protection, and conceivably aggravated punitive damages would have been the result. Yet its assertion of "detriment" from the alleged loss of an opportunity not to retract, an option that even an innocent publisher would not have exercised, is typical of the sheer arrogance of this tabloid. As the facts and opinion show, it did not, and did not intend to, retract properly in any event.

There is no issue of vagueness. The statute told Appellant what to do — yet it wilfully did not. Nowhere does Appellant complain that it didn't know how to retract because the statute was vague. It now asserts that it thought it was a newspaper, although California precedent 15 years and 1 year prior to the libel established the principles under which this court, based on the Enquirer's own operation, found it was not. How could any vagueness in terminology have caused Appellant to write a retraction insufficient even by common law standards of mitigation? More specifically, had it been a *newspaper* and *not retracted*, it still would be entitled to the hatred or ill will standard under § 48a, a consequence not affected one way or the other by an attempt to retract, or an insufficient retraction. What is Appellant's loss?

## THE ENQUIRER'S CHALLENGE TO THE PROPRIETY OF A PUNITIVE DAMAGE AWARD IN A PUBLIC FIGURE LIBEL ACTION IS MERITLESS, HAS BEEN UNANIMOUSLY REJECTED BY ALL FEDERAL COURTS CONSIDERING IT, AND IS PARTICULARLY INCONGRUOUS IN THE FACTS PRESENTED.

### A. Though Not so Advising This Court, the Enquirer Has Argued to the California Court of Appeal That the Very Question of Punitive Damages It Here Claims to Be "Substantial" Is Not Ripe for Decision and May Be Mooted.

The Enquirer's attack on punitive damages in this case is most peculiar as there is no award of punitive damages currently outstanding to attack. The California Court of

Appeal granted a new trial on the issue of the amount of punitive damages.[7] Thus, the state of record is that this matter is awaiting retrial on the issue of the amount of punitive damages.

This fact and its significance is well known to the Enquirer, which though failing to point it out to this Court, repeatedly stated it to the California Court of Appeal, Second Appellate District, in the matter of *Employers Reinsurance Corporation v. National Enquirer, Inc.*, 2d Civ. No. 69508. That matter is one between the Enquirer and its insurance carrier dealing with whether or not the carrier is obligated to reimburse the Enquirer for a punitive damage award in this case. In an effort to extend its time to file its opening brief,[8] the Enquirer argued:

> "*[T]here is now no outstanding punitive damage award in the Burnett case*" (*emphasis in original*) (Application, p. 1).
>
> * * * * * *
>
> "Since there is no outstanding punitive award in the Burnett case, the question of whether any such punitive damages can be indemnified involves at this time only 'abstract or academic questions of law [citation]'." (Application, p. 8).

The Enquirer further stated:

> "This Court should not be asked to resolve a hypothetical issue . . ." (Application, p. 4) "This appeal is thus not now ripe" (Application, p. 7).

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[7]The new trial order was conditioned upon Burnett's failure to accept within thirty (30) days after final remittitur to the Los Angeles Superior Court, a reduced punitive award of $150,000. Thirty (30) days elapsed and Burnett did not accept the reduced award.

[8]The papers to accomplish this were denominated: "Reply To Opposition To Application For An Order Extending Time To File Opening Brief" ("Reply") and "Appellant's Application For An Order Extending Time to File and Opening Brief" ("Application").

Before this Court, where the Enquirer seeks to characterize its punitive damage argument as "substantial", its contradictory argument in a setting where its interests were different is nowhere to be found.

Although there is currently no outstanding punitive damage award, the Enquirer proffers arguments ignoring still other salient features of this case. The Enquirer insists:

(a) That the trial judge was somehow "out to get it" because of its brand of journalism (Stmt., p. 25) (Ignoring that the trial judge on a motion for new trial *reduced* the punitive damage award from 1.3 million dollars to $750,000);

(b) That the California Court of Appeal was also "out to get it" by directing "that a publisher stand trial civilly solely for the purpose of determining punishment for a publication" (Stmt., p. 29) (Ignoring that the granting of the new trial was the very relief which the Enquirer sought and was only accorded if Burnett failed to accept the Court's drastic reduction in the punitive award from $750,000 to $150,000);

(c) That the balance of competing interests involved in a libel action should be moved further away from the individual's interest in privacy and reputation by requiring additional and higher standards in order to obtain punitive damages (Ignoring that *New York Times v. Sullivan* and its progeny has established the accommodation of these competing interests);

(d) That there is a First Amendment chill in imposing punitive damages in the libel context (Although the existence of any chill is unlikely in the facts of this case where "acts of fabrication and reckless disregard by Brian Walker" (p. 59a) make it obvious the decision was made to publish notwith-

standing knowledge of falsity or any uncertainty of the effect on Respondent, thus evidencing "reprehensible" journalistic conduct. (p. 26a));

(e) That there is a "threat of unlimited punitive damages" (Stmt., p. 24) (Though the reduction of the jury's 1.3 million dollars to $150,000 in this very lawsuit reflects aggressive and to a certain extent unwarranted checks upon such awards); and,

(f) That the "greatest danger . . . is that punitive damages will be used for arbitrary punishment of unpopular publishers and unpopular views" (Stmt. p. 25) (Although here, in the view of 11 trial and appellate judges and a unanimous jury, the Enquirer was punished not for any "unpopular views" but for the most flagrant violation of journalistic ethics; knowingly publishing lies. Furthermore, with 16 million readers (p. 32a), the Enquirer can hardly claim to be unpopular).

The constitutional ramifications of publishing a known falsehood have been appropriately commented upon by this Court.

> "Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . .' [citation]. Hence, *the knowingly false statement, and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.*" *Garrison v. State of Louisiana*, 379 U.S. 64, 75 (1964) (*emphasis added*).

It is only for constitutionally unprotected and intentional lies that the Enquirer was subjected to punitive damages.

In light of the current procedural posture of this case and the substantial evidentiary justification for a punitive award under any standard, the facts here do not justify review.

**B. Relying on This Court's Authorities, the Federal Circuit Courts Considering the Issue Have Unanimously Approved Punitive Damage Awards in Libel Cases.**

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), this Court stated:

> "[T]he states may not permit recovery of . . . punitive damages, . . . where liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."

This statement has been construed by five federal circuit opinions, emanating from four different federal circuits, to imply that punitive damages may be permitted when actual malice is proven. *See, Maheu v. Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1977); *Goldwater v. Ginzburg*, 414 F.2d 324 (2nd Cir. 1969), *cert. denied*, 396 U.S. 1049; *Buckley v. Littell*, 539 F.2d 882 (2nd Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Davis v. Schuchat*, 510 F.2d 731 (D.C. Cir. 1975); *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976).

The logic behind permitting punitive damages in libel cases fully supports the implication in *Gertz*. Judge Duniway in *Maheu, supra*, stated:

> "It is important to safeguard First Amendment rights; it is also important to give protection to a person who was intentionally and maliciously defamed and to discourage that kind of defamation in the future. A balance must be struck between these two competing interests. The language in *Gertz* suggests that punitive damages may be allowed in a case such as this where actual malice has been established. California has chosen to allow such recovery and we find that the state's interest in deterring malicious defamation for the purpose of protecting privacy and reputation, even when public

> figures are involved, is compelling." 569 F.2d at 479-480.

California has therefore adopted the position that *New York Times* malice is sufficient in a public figure libel case, without a showing of hatred, to award punitive damages. *Bindrim, supra.*

Furthermore, since damages to reputation and loss of business opportunities resulting from a libelous publication are often difficult, if not impossible, to prove, punitive damages may, at least in part, serve to fully compensate libel plaintiffs and buttress the important state policy of § 3294 to encourage individuals to enforce rules of law and enable them to recoup the expense of doing so. *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 810; 174 Cal.Rptr. 348, 383 (1981). Thus, to the extent punitive damages are, in a sense, a windfall to plaintiffs,[9] they are less so in the context of a libel action.

**C. § 3294 Is Not Unconstitutionally Applied at Bar.**

The Enquirer contends that application at bar of § 3294, embodying California's general standard for recovery of punitive damages, is unconstitutional. In response to a similar constitutional attack on § 3294, in *Maheu, supra* at 480, the Court stated:

> "First, § 3294 is not vague or overly broad when applied in conjunction with the safeguards imposed by the *New York Times* line of cases, and specifically, *Gertz*. In addition, § 3294 merely codified the earlier California common law of punitive damages which 'specifically defines when exemplary damages may be

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[9]Punitive damages are of course not awarded with compensation to the Plaintiff in mind, but rather with an eye towards punishing the wrongdoer and deterring such future conduct by it and others similarly situated.

awarded and how the amount shall be determined.' [citation]. Moreover, any uncertainty as to the amount of permissible punitive damages in any specific case does not invalidate the statute. Fair warning concerning the specific conduct which is prohibited has been provided by relevant case law. The fact that the amount of a proper damage award may not be precisely known before trial does not make that award unconstitutional."

* * * * * *

"Finally, Summa argues that § 3294 violates the First Amendment by allowing excessive damage awards. California courts, however, require a reasonable relationship between the punitive damages and actual damages awarded. [citation][10] If an excessive amount is awarded, the court may reduce it by remittitur.[11] Sufficient safeguards against excessive punitive damages are therefore provided."

* * * * * *

"We conclude that punitive damages are permissible once actual malice as defined in *New York Times* has been established and that the statute is not overly broad or void for vagueness . . ."

*See also Grimshaw, supra* at 811; 174 Cal.Rptr. at 383 (unconstitutionality "repeatedly rejected").

Furthermore, despite the Enquirer's suggestion that the "conscious disregard" requirement of § 3294 is something less than the common-law hatred or ill-will prerequisite for punitive damages, California cases have unambiguously

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[10]The trial court in this case in fact instructed with respect to that reasonable relationship, and reduced the punitive damage award when it reduced the punitive award to comport with that relationship. (p. 60a).

[11]The court in this case availed itself of the option of remitting the amount of punitive damages from $1,300,000 to $750,000, and the California Court of Appeal further but unwarrantedly reduced the punitive damage award from $750,000 to $150,000.

concluded that § 3294 is nothing more than a codification of the common law standard. *Bertero v. National General Corp.*, 13 Cal.3d 43, 66; 118 Cal.Rptr. 184; 201; 529 P.2d 608, 625 (1974); *Maheu, supra*, at 480. Thus, for this Court to conclude that § 3294 is unconstitutional is nothing more than to invalidate all punitive damages in libel cases as provided by common law.

The Enquirer claims that mere showing of "conscious disregard" by the mere preponderance of the evidence is insufficient to justify punitive awards in public figure libel cases, and that "hatred or ill will must be demonstrated" (Stmt., p. 26). In addition to being unsupported in this Court's decisions, this argument is founded upon the faulty premise that hatred or ill will can only be proven by demonstrating subjective, personal animosity toward the plaintiff. However, ill ("bad" or "evil") will does not connote personal animosity and may be proved, as previously discussed, directly or indirectly by evidence of evil motive and intent.

**THE APPEAL SHOULD BE DISMISSED SINCE IT IS FRIVOLOUS AND DILATORY.**

As the foregoing sections of this Motion set forth, this Court should not accept this appeal since it raises no substantial federal issues for review. Taken only after the judgment had become final as to California courts and Appellee elected a retrial, it is simply an attempt by the Enquirer to pursue every possible legal theory to come within the ambit of § 48a or avoid punitive damages, no matter how unmeritorious. The Superior Court, confronted with this issue after the California Supreme Court denied hearing, apparently arrived at a similar assessment of this appeal, and declined to grant Appellant's request for a stay, notably not renewed before this Court.

The record on both the California punitive damage statute, § 3294, and the retraction statute, § 48a, is "so clear and well established that the [Enquirer's] position is simply untenable." *Maneikes v. Jordan*, 678 F.2d 720, 722 (7th Cir. 1982).

This is a clear case for the imposition of sanctions under Rule 49.2, and 28 U.S.C. § 1912 (1966) since the only apparent purpose of this appeal is to impose additional costs on Appellee. Her case will have been pending for 8¾ years at the time of the December 10, 1984 retrial, so scheduled after the Superior Court's inquiry into the time parameters of this Appeal.

**CONCLUSION.**

For the reasons set forth in the foregoing sections of this Motion, Appellee Carol Burnett respectfully requests that this Court grant her motion, or in the alternative, summarily affirm.

Dated: January 27, 1984.

Respectfully submitted,

BARRY B. LANGBERG,
STEPHEN S. MONROE,*
PAUL S. ABLON,
RICHARD P. TOWNE,
SUSAN R. SCHWARTZ,
*Attorneys for Appellee*
*Carol Burnett.*

*Of Counsel:*
HAYES & HUME.

**Counsel of Record.*

No. 83-1076

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1983

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NATIONAL ENQUIRER, INC.,
*Appellant,*

v.

CAROL BURNETT,
*Appellee.*

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**On Appeal from the California Court of Appeal, Second Appellate District**

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## BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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JOHN G. KESTER *
HAROLD UNGAR
Hill Building
Washington, D.C. 20006
(202) 331-3069
*Attorneys for Appellant*

*Of Counsel:*
WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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OCTOBER TERM, 1983

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NATIONAL ENQUIRER, INC.,
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CAROL BURNETT,
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**On Appeal from the California Court of Appeal, Second Appellate District**

## BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Although Appellee tries to raise questions as to whether the procedural requirements for review were complied with, both issues presented in the Jurisdictional Statement were preserved below and are properly before this Court.

### I. THE ABSENCE OF ILL WILL HERE WAS CONCEDED.

Appellee's motion attempts to argue that ill will of the publisher should be inferred by this Court as a matter of law. That new position is untenable:

1. Appellee's counsel conceded on the record that no claim was made that Appellant had any hatred or ill will. R.T. 1318.[1] The courts below assumed ill will was absent, holding that "conscious disregard for the rights of others" sufficed instead. R.T. 1335; J.S. 19a-21a.

[1] Citations to "R.T." are to the reporter's transcript, and "C.T." to the Clerk's transcript, from the trial court. "Motion" refers to Appellee's Motion to Dismiss or Affirm filed herein, and "J.S." to Appellant's Jurisdictional Statement.

2. The issue was never put to the jury. Appellant's proposed instruction that ill will must be proven for punitive damages was refused. C.T. 1615; R.T. 1141. The jury was specifically instructed that it could impose punishment based simply on finding "conscious disregard for the rights of others." R.T. 1335.

## II. WHETHER PUNITIVE DAMAGES MAY CONSTITUTIONALLY BE AWARDED TO A PUBLIC FIGURE, ABSENT ILL WILL AND DAMAGE TO REPUTATION, IS A QUESTION PROPERLY BEFORE THIS COURT ON APPEAL.

The Motion to Dismiss never even mentions the cases cited in the Jurisdictional Statement that have held punitive damages barred by the First Amendment in a public-figure libel case like this.[2] Nor does it acknowledge the doubts expressed by the American Law Institute.[3] Instead, the Motion argues that this substantial issue of federal constitutional law as to which the lower courts are in conflict should be passed over—even in this appeal within this Court's mandatory jurisdiction—simply because the exact amount of the punitive award is not fixed, Appellee having rejected $150,000 and elected to try for more. But the precedents of this Court amply demonstrate that now is the time for this question to be settled.

1. First, the ordering of a new trial on the limited issue of punishment in no way alters the clear finality of the judgment as to liability. *Brady* v. *Maryland*, 373 U.S. 83, 85 n.1 (1963). This case is here on appeal, under 28 U.S.C. § 1257(2). There is no doubt at all that

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[2] *Sprouse* v. *Clay Communication, Inc.*, 211 S.E.2d 674 (W.Va.), *cert. denied*, 423 U.S. 882 (1975); *McHale* v. *Lake Charles American Press*, 390 So. 2d 556, 570 (La. App. 1980), *cert. denied*, 452 U.S. 941 (1981); *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161 (1975).

[3] RESTATEMENT (2d), TORTS § 621, comment *d* (1977). See also the doubts expressed by the Second Circuit in *Buckley* v. *Littell*, 539 F.2d 882, 897 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

the constitutionality under the First and Fourteenth Amendments both of California Civil Code § 48a and of California Civil Code § 3294 was challenged below, *e.g.*, R.T. 1142, C.T. 1752, 1757-58, 1765-66; Brief for Appellant, Court of Appeal, at 43, 48-50, and that the decision below was in favor of their validity. Appellee concedes this. See, *e.g.*, Motion at 26. This case therefore is here on the merits, and this Court's ruling will be a decision on the merits, binding on all other courts, see *Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975), as to whether § 48a can constitutionally exclude the *Enquirer* from its protection based solely upon evaluation of the content of four other issues, and also as to whether § 3294, authorizing punitive damages based solely on "conscious disregard for the rights of others," is constitutional as applied in a public-figure libel case where on the record admittedly there was no ill will and no damage to reputation.[4]

2. Controlling on this point are the holdings of this Court in *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974), and *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). In *Tornillo*, the state supreme court had remanded the entire case (not just, as here, the issue of setting punishment) to the trial court for further proceedings. This Court held that the case was appropriately before it, particularly because "Whichever way we were to decide the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment . . . ." 418 U.S. at 247 n.6. In *Cox Broadcasting*, this Court carefully canvassed its decisions respecting cases brought before it where a state appellate court has mandated further proceedings, noting that "In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other Fed-

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[4] Even in discretionary certiorari cases this Court grants review where, for example, the issues are clear under the Freedom of Information Act even though no documents have been ordered produced and the appellate court has ordered a remand to determine whether any should be. *E.g.*, *FTC* v. *Grolier, Inc.*, 103 S. Ct. 2209 (1983); *FAA Administrator* v. *Robertson*, 422 U.S. 255 (1975).

eral questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice,' " 420 U.S. at 477-78 (footnote omitted), quoting in part *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945).[5]

3. Finally, this Court often has recognized that to be forced into expensive unjustified litigation to defend against punishment can itself be a denial of First Amendment rights. "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski* v. *Pfister*, 380 U.S. 479, 487 (1965). It is already conceded by Appellant on the record that ill will and damage to reputation were absent here. R.T. 1318, 717, 1195-96. We here contend that the First and Fourteenth Amendments bar *any* award of punitive damages in *any* amount to a public figure when those elements concededly are not present. That straightforward issue is before this Court now. Where the constitutionally controlling facts—here, absence of ill will and of damage to reputation—are established, decision by this Court without further expense and delay is called for. *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69, 73-74 (1946).[6]

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[5] This Court noted specifically that "if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue . . . ." 420 U.S. at 483. See also, *e.g.*, *New York* v. *Cathedral Academy*, 434 U.S. 125, 128 n.4 (1977); *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386 (1964); *Local No. 438, Construction & General Laborers' Union* v. *Curry*, 371 U.S. 542 (1963); *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963). The posture of this case also parallels that of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), itself. There this Court after holding that the jury had been improperly instructed went on to conclude that the facts of record could not meet the constitutional test for damages. 376 U.S. at 284-85.

[6] Appellee's quotations out of context (Motion at 2, 22) from pleadings in a totally different case, referring to the uncertain

As the law now stands, some states hold that punitive damages may be imposed in public-figure libel cases even without ill will; other states hold that under the First Amendment punitive damages are barred in such cases entirely. The rule should not depend, as it now does, on the state in which suit is brought. The issue is properly here, and only this Court can resolve it.

## III. THE CONSTITUTIONALITY OF THE CALIFORNIA STATUTES WAS PROPERLY CHALLENGED BELOW, AND THE OUTCOME IS CONTROLLED BY FEDERAL LAW.

In a number of broad-brush assertions, based on ignoring the record or supplementing it from imagination, Appellee now argues that the constitutionality of California Civil Code § 48a is not before this Court. The record demonstrates otherwise.

1. Appellee first ignores the fact that the arbitrary application of § 48a violates the First and Fourteenth Amendments, see *Police Dept.* v. *Mosley*, 408 U.S. 92 (1972), not just the equal-protection guarantees of the Fourteenth. The constitutionality under the First and Fourteenth Amendments of subjecting Appellant to damages in this case was challenged as early as the answer, C.T. 75, and thereafter. Also, § 48a is not the only stat-

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amount of a punitive award, are inapposite, misleading, and apparently designed to confuse. Appellee fails to explain that *none* of those comments as to unripeness was describing *this* case at all. All the quoted matter had to do with defending a preemptive declaratory-judgment action brought by Appellant's insurance carrier seeking a judgment that it need not indemnify for punitive damages. The issue in that case depended upon whether damages had been determined. Appellant's position in that case has been that, *until this Court rules in the present case and determines whether punitive damages are awardable here at all*, there is no insurance claim pending and no basis for a determination whether there is liability to indemnify under California insurance law. In other words, the pendency of the present appeal challenging the very legality of punitive damages makes that indemnity litigation premature. That other litigation has nothing at all to do with the present issue in this case.

ute whose constitutionality was challenged here. The constitutionality as applied of California Civil Code § 3294, the punitive damage statute, was also challenged in the trial court and on appeal, C.T. 1757-58, as Appellee's Motion (at 26) recognizes.

With respect to § 48a, as soon as the trial court, reversing its earlier rulings, refused Appellant's proposed jury instructions that were based upon § 48a (at page *1141* of the transcript) it said, "And now I can listen to your speech." On page *1142* of the transcript, Appellant's counsel immediately challenged the statute as interpreted, as violating the constitutional guarantees of equal protection.[7] Later Appellant's counsel again urged the trial court that "Civil Code § 48a . . . would appear to be unconstitutional as a denial of equal protection of the law under both the United States and California Constitution," C. T. 1765, and referred to "the apparent constitutional infirmity of Section 48a," C. T. 1766. Thus the statute was challenged on Federal constitutional grounds in the trial court not once but *twice*,[8] as it continued to

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[7] "Your Honor, I will say this briefly. We had requested that even in light of the court's ruling that defendant National Enquirer is a magazine, which we respectfully submit was erroneous, we are, nonetheless, even as a claimed magazine, entitled to the protection, benefit, classification, all privileges embodied in Civil Code section 48(a), because the limiting of whatever benefits to newspapers, radio, would be an arbitrary and unequal classification by the legislature, depriving a person in the position of the defendant of due process of law and denial of equal protection. And I submit it.

"THE COURT: All right. Thank you." R. T. 1142.

[8] As noted, the constitutional claim was raised practically in the same breath as the trial court's ruling. Moreover, all the California cases that Appellee cites, Motion at 9, as requiring claims to be raised early in the trial court, in fact hold nothing more than the commonplace rule that objections must be raised *sometime* in the trial court, rather than for the first time on appeal. *E.g.*, *Geftakys* v. *State Personnel Bd.*, 138 Cal. App. 3d 844, 864, 188 Cal. Rptr. 305, 317 (1982) ("The point . . . was not raised in the trial court"); *Bidart Bros.* v. *Elmo Farming Co.*, 35 Cal. App. 3d 248, 263, 110 Cal. Rptr. 819, 828 (1973) ("This was not urged at the trial level . . . ."); *Estate of Cran*[illegible], 73 Cal. App. 2d 93, 165 P.2d 940 (1946) (15-year

be on appeal.[9] No rule requires that constitutional objections must be raised three times in the trial court to be preserved. And there is not a word, not a hint, in the opinion to suggest that the court below considered any of the claims before it procedurally barred; instead, the opinion discusses the constitutional issues raised under the First Amendment throughout.[10]

2. Appellee argues that the retraction and apology published here could not possibly serve as a "correction" under § 48a, so that the exclusion of Appellant from that statute's protection can be ignored. (That, of course, would in no way affect this Court's jurisdiction over the punitive-damage issue, or the challenge to the constitutionality of § 3294 as applied.) With no record basis, Appellee asserts, Motion at 2, that Appellant was "found" not to have complied with § 48a—the very statute the courts below explicitly put aside and refused to apply at all. No such finding exists.

Appellee's argument that the correction can be ignored as insufficient contradicts Appellee's own prior position below: Appellee's counsel conceded to the trial court

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delay). Moreover, whether a federal claim is seasonably raised is a federal question. *Street* v. *New York*, 394 U.S. 576, 583 (1969).

[9] "To construe § 48a to exclude periodicals like the National Enquirer . . . . would be an arbitrary and irrational distinction, based apparently on media content, which would violate the First and Fourteenth Amendments of the United States Constitution. . . ." Brief for Appellant, California Court of Appeal, at 43. "If Respondent's interpretation of § 48a were adopted, therefore, that statute would violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution . . . ." Reply Brief for Appellant, California Court of Appeal, at 7. The claim was also raised in the Supreme Court of California, which denied review. Appellant's Petition for Hearing, Supreme Court of California, at 12, 18-21.

[10] If there were any doubt as to whether the court below had considered the federal claims properly before it, the proper disposition of the appeal would be to vacate and remand for clarification of the point. *Department of Mental Hygiene* v. *Kirchner*, 380 U.S. 194, 197 (1965).

that it was "clear" that "the sufficiency of any retraction is one for the jury," and "clear that a substantial issue of fact exists as to the sufficiency of the retraction." C.T. 111. That issue of fact was never addressed or resolved because, based on its holding that § 48a was inapplicable, R.T. 1028, the court never put the adequacy of the correction to satisfy § 48a to the jury, as it would have had to do if it had held § 48a applicable. *Behrendt* v. *Times-Mirror Co.*, 30 Cal. App. 2d 77, 85 P.2d 949 (1938).

The correction was brought to the jury's attention solely for consideration *only* in possible mitigation of damages. R.T. 1333-34, C.T. 1230.[11] In that same context of weighing possible mitigation of damages, in portions of their opinions clearly so labeled and limited, J.S. 25a, 56a, both courts below made disparaging comments about the correction—a correction which, we submit, was not only sufficient to be a retraction but indeed was abject and even coupled with an apology—a retraction far more generous and complete than most such found in the daily press.[12] Because the courts already had held § 48a inapplicable, neither the jury nor the courts ever measured it against the standards of § 48a, which calls simply for a "correction." Indeed, if the courts below had held such a

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[11] "Any correction published by defendant *may be considered by you in mitigation of any damages* you decide plaintiff may be entitled to recover." R.T. 1333-34 (jury instruction) (emphasis supplied).

[12] The retraction, printed in bold-face type, read:

> **"An item in this column on March 2 erroneously reported that Carol Burnett had an argument with Henry Kissinger at a Washington restaurant and became boisterous, disturbing other guests. We understand these events did not occur and we are sorry for any embarrassment our report may have caused Miss Burnett."**

The original item contained 66 words; the retraction and apology contained 50 words. Appellee herself testified that the original story would have been acceptable had it described her behavior that evening as "effervescent" rather than "boisterous." R. T. 811.

retraction inadequate to qualify as a "correction" under § 48a, rather than merely ignoring it in mitigating damages, a separate First Amendment violation would have occurred because of the utter unsupportability of such a holding under prior California constructions of the correction statute.[13] But in fact, as the record makes clear, § 48a was held inapplicable and the adequacy of the correction under § 48a was an issue never reached and never passed upon. See *Time, Inc.* v. *Firestone*, 424 U.S. 448, 462-63 (1976).

## IV. THE OPINION BELOW MAKES LEGAL RIGHTS TURN ON IMPRESSIONS OF CONTENT.

Appellee defends the judgment below by claiming that § 48a can constitutionally be limited to publishers of what courts consider "hot news." Motion at 19. That ignores, first of all, that the *Enquirer* like many other weeklies *does* have tight deadlines and *does* prepare "rush" stories—about twenty-five to thirty per week, according to the undisputed evidence. R.T. 1008. It also ignores the fact, clearly acknowledged by the trial court on the record, that the court amazingly based its ruling as to "hot news" on reading *four other* issues of the *Enquirer*, and did not examine the issue in which the news item complained of appeared. R.T. 935-36, 1018; C.T. 1573. Even beyond these failings, however, Appellee's rationale simply does not hold up legally.

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[13] See, *e.g.*, *Behrendt* v. *Times-Mirror Co.*, *supra*; *DiGiorgio Corp.* v. *Valley Labor Citizen*, 260 Cal. App. 2d 268, 67 Cal. Rptr. 82 (1968); on which Appellant relied. A state could not redefine its requirements for statutory compliance so as to cut off rights reasonably relied and acted upon by a publisher. *Cf. Tornillo*, *supra*. *Barr* v. *City of Columbia*, 378 U.S. 146, 149-50 (1964); *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288 (1964); *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957). See also *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958) ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."); *Ward* v. *Board of County Commissioners*, 253 U.S. 17 (1920).

The California statute in terms and as applied up to now does *not* restrict its coverage to fast-breaking news. As interpreted, it covers *anything* that appears in whatever is held to be a "newspaper" or on radio or television—including book reviews, editorials, or daytime soap operas —but *nothing* that appears in the *National Enquirer*—even, as in this very case, a news item. What has happened here is that an entire publication has been banished from statutory protection based solely on subjective impression of the timeliness of *its content* (without any court's even considering the issue in which the article complained of appeared), and punished based on subjective evaluation of its worth.[14] J.A. 60a.

## CONCLUSION

For the reasons stated here and in the Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted,

*Of Counsel:*

WILLIAMS & CONNOLLY
Hill Building
Washington, D.C. 20006

* Counsel of Record

JOHN G. KESTER *
HAROLD UNGAR
Hill Building
Washington, D.C. 20006
(202) 331-3069
*Attorneys for Appellant*

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[14] The Motion contains other incorrect statements. Twice at p. 23 it quotes Appellant as having stated that the courts below were "out to get it." The language Appellee quotes does not appear in the Jurisdictional Statement or anywhere else. The Motion states at p. 28 that the trial court "declined to grant Appellant's request for a stay;" Appellant has never had occasion to move for a stay, and *a fortiori* no such application has ever been denied. The Motion suggests, at p. 16, that denial of a hearing by the California Supreme Court constitutes review and approval. The contrary is settled law. "[W]e declare that our refusal to grant a hearing in a particular case is to be given *no weight* . . ." *People* v. *Triggs*, 8 Cal. 3d 884, 890, 506 P.2d 232, 236 (1973) (emphasis in original).